SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 881.

WALTER B. GRANT AND E. E. BURLINGAME, APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA,
Southern District of New York, ss.:

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto and pursuant to the within notice of appeal, do hereby certify, that the following pages, numbered from 1 to 300, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Walter B. Grant et al., plaintiffs in error, against United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 17th day of October, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

b United States District Court for the Southern District of New York.

WALTER B. GRANT AND ELMER E. BURLINGAME, PLAINTIFFS IN ERROR,
against
UNITED STATES OF AMERICA, DEFENDANT IN ERROR, IN THE matter of the alleged contempt of Walter B. Grant, an attorney at law.

It is hereby stipulated and agreed, that the following pages, numbered from 1 to 300, inclusive, contain a true and complete transcript of the record and proceedings had in the United States District Court for the Southern District of New York, in the above-entitled case of Walter B. Grant and Elmer E. Burlingame, plaintiffs in error, against United States of America, defendant in error.

Dated New York, October 16, 1912.

KEENER, FLANNAGAN & ERSKINE,
Attorneys for Plaintiffs in Error.

HENRY A. WISE,
United States Attorney, for the Southern District of New York, Attorney for the Defendant in Error.

(Indorsed:) U. S. District Court, Southern District of New York. Walter B. Grant & Elmer E. Burlingame, plaintiffs in error, against United States of America, defendant in error, in the matter of the alleged contempt of Walter B. Grant, an attorney at law. (Original.) Stipulation. Keener, Flannagan & Erskine, attorneys for plaintiffs in error, 52 Wall Street, borough of Manhattan, New York City.

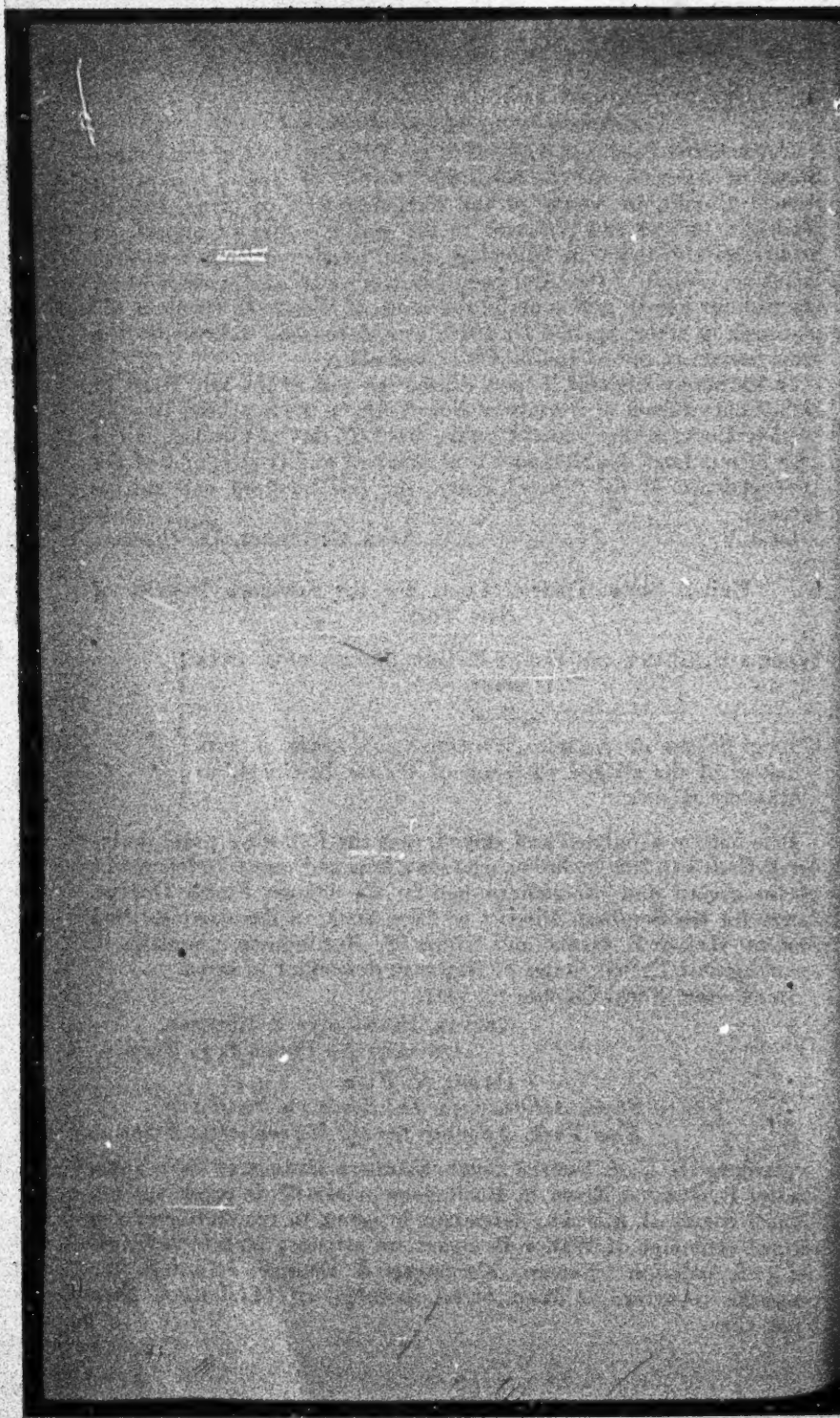


Exhibit A.

At a stated term of the United States District Court for the Southern District of New York, held in said district in the United States courthouse and post-office building, in the city and county of New York, on the 28th day of March, 1912.

Present: Hon. Learned Hand, United States district judge.

In the Matter of the Alleged Contempt of Walter B. Grant, an Attorney at Law.

The witness, Walter B. Grant, having, on the 28th day of March, 1912, appeared before the grand inquest of the body of the people of the United States of America for the Southern District of New York, pursuant to a subpœna to testify in regard to an alleged violation of the Statutes of the United States by J. D. Smith, and to produce the ledgers, journals, and cash books of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received and copies of letters and telegrams sent by said company during the years 1907, 1908, 1909, and the said witness having been sworn before the said grand jury and having testified that he was an attorney at law engaged in the defense of one Elmer E. Burlingame;

And it appearing that said Burlingame is under two indictments by said grand jury, the first in connection with one Cova, and
2 the second in connection with J. D. Smith, Samuel E. Darby, Lee De Forest, and The Ellsworth Company, and it appearing that said Burlingame is released on bail under each of said indictments;

And the witness Grant having been asked before said grand jury if he had received from said Burlingame any box or boxes of books or papers, and he having declined to answer further than to say that anything received by him from said Burlingame was received as his attorney for the purpose of consultation with him professionally and for the purpose of preparing for his defense, the said Grant basing such refusal on the ground that he could not disclose any professional communications with or from said Burlingame, and that any such communication was privileged;

And the witness having been asked if he had opened any box or boxes in his office, so delivered to him by his said client, to ascertain if they contained the books relative to The Ellsworth Company, directed to be produced by the said subpœna, and he having declined to admit the receipt of any box or boxes, and having answered that he had not opened any such box or boxes, and having declined to open any box or boxes, if any so received, from his said client Burlingame to ascertain whether or not they contained any of the books and papers called for by the said subpœna, and the said witness Grant having based such refusal on the ground that he has no right to

open any box or boxes, if any, delivered to him by his said client, as aforesaid, for the purpose of disclosing whatever he might learn by so doing, because to do so would violate his duty to his client and violate his client's privilege;

3 And the said Grant having been further asked whether or not he received a bill of lading or shipping receipt for certain goods from one McLane, an agent of said Burlingame, and having refused to answer on the ground of privilege, and that the information that the same was received, if received, was privileged knowledge or a privileged communication;

And the said Grant having thereupon been presented by the said grand jury to the court for contempt for such refusals, and the said Burlingame having thereupon appeared in court by Dallas Flannagan, Esq., his counsel, and set up that the books and papers called for by said subpœna are the personal and individual property of said Burlingame, and not of The Ellsworth Company, and that to produce the same, to disclose their contents, or to disclose their whereabouts would tend to incriminate said Burlingame, and further, that to disclose that the said bill of lading was received or its whereabouts, would tend to incriminate said Burlingame:

Ordered, That it be, and is hereby, referred to Edwards H. Childs, Esq., attorney at law, of 59 Wall Street, New York City, to take evidence as to the rights and privileges claimed by said Grant, and as to the title and ownership of said books and papers called for by said subpœna, and to take such other evidence as may be relevant to the questions raised as aforesaid, and to report such evidence with his conclusions thereon to the undersigned, whereupon fur-

4 ther order of the court will be made. And the said Edwards H. Childs is hereby appointed a referee for the said purposes.

(Sgd.) LEARNED HAND,
Judge United States District Court for the Southern District of New York.

Consented to as to form.

(Sgd.) HENRY A. WISE,
United States Attorney.

(Sgd.) KEENER, FLANNAGAN & ERSKINE,
Attys. for W. B. Grant and E. E. Burlingame.

5 (Indorsed:) United States District Court, for the Southern District of N. Y. In the matter of the alleged contempt of Walter B. Grant, an attorney at law. (Copy.) Order appointing referee. Keener, Flannagan & Erskine, attorneys for E. E. Burlingame & W. B. Grant, 52 Wall Street, Borough of Manhattan, New York City. U. S. District Court, Apr. 8, 1912. S. D. of N. Y.

6 United States District Court, Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

Before Edwards H. Childs, Esq., referee.

New York, April 23, 1912.

Appearances: William A. Keener, Esq., and Dallas Flannagan, Esq., attorneys for Walter B. Grant; Henry A. Wise, Esq., United States district attorney, by Robert Stephenson, Esq.

The oath of the referee is waived.

It is stipulated between counsel that Elmer E. Burlingame is under two several indictments by a grand jury of the United States for the Southern District of New York, one of which is in connection with one Cove, and the other is in connection with The Ellsworth Company, James D. Smith, and others, said indictments being dated, respectively, as follows: Aug. 30, 1911, and March 15, 1912.

The said indictments against Smith and Burlingame being in connection with the Radio Telephone Company, so called.

WALTER B. GRANT, being duly sworn and examined on his own behalf, testified as follows:

By Mr. FLANNAGAN:

Q. What is your occupation?

A. I am an attorney and counsellor at law.

Q. How long have you been such?

A. I was admitted in 1885, in the Supreme Court of the District of Columbia, and I was admitted to the Supreme Court
7 of the State of Massachusetts in 1891.

Q. Are you admitted to the Supreme Court of the United States?

A. I am. I was admitted in that court in 1889.

Q. Do you know Elmer E. Burlingame?

A. I do.

Q. Have you any relation to him?

A. I have been his attorney since 1908.

Q. Have you any relations with him in connection with the indictments that have been referred to here?

A. I have. I am his attorney in that also.

Q. You are engaged in his defense in that matter?

A. I am.

Q. And, as I understand, you were engaged in his defense at the time that this subpœna was served upon you, under which you appeared before the grand jury?

A. Yes; that was March 13, 1912.

Q. Now, Mr. Grant, have you any books, papers, or other documents in your possession except for consultation with Mr. Burlingame as his attorney?

A. None whatever.

By the REFEREE:

Q. Are you a member of the bar of the State of New York?

A. No; I am not.

Q. Or of the bar of the United States District Court for the Southern District?

A. I am not. I have been admitted in several of the district courts, but not in this one.

Cross-examination by Mr. STURGESS:

Q. Mr. Grant, where were you when this subpœna was served on you?

A. I was in the city of El Paso, Texas.

Q. And at that time you were engaged in the business of Mr. Burlingame, were you?

8 A. I had been consulted by him prior to my leaving Massachusetts, which was in the early part of January of this year.

Q. But when the subpœna was served upon you you were not doing any work in connection with his defense, were you?

A. Why, not that particular minute. I was there in El Paso on other business.

Q. And while you were in El Paso did you do any work in connection with his defense?

A. No active work.

Q. Well, what kind of work, active or inactive?

A. Why, I had been retained by him, meaning that he had consulted me as his attorney before I left, and I was still in that form, and I would say that in answer to a telegram from Mr. Wise, I think just about this date, perhaps the day before, I had wired at his request—I had wired the district attorney that anything that I had that might relate to the question of The Ellsworth Company was delivered to me by Mr. Burlingame and was privileged, and I had a telegram from Mr. Burlingame advising me that anything in my possession was privileged, as being a communication from him as his attorney to me.

Q. Now, Mr. Grant, have you any of the records of The Ellsworth Company in your possession?

A. Not to my knowledge.

The REFEREE. You are talking about the things that are called for in the subpœna, I take it.

Mr. STURGESS. Yes; first, generally now, I am asking him about that.

Q. Now, have you in your possession any of the records called for in the subpœna?

A. Not to my knowledge.

Q. Have you searched your offices to see whether you have any of those in your possession?

A. I have searched——

9 Q. In which office did you search?

A. I have searched both my offices.

Q. And where is one of them?

A. My office for the consultation with clients is 18 Tremont Street, Boston, and I am trustee of an estate and do a great deal of my work, where I wish to be uninterrupted, in the Board of Trade Building on State Street in Boston.

Q. What number on State Street?

A. 131 State Street.

Q. Now, did you search every place in your office at 18 Tremont Street?

A. Why, no; of course where I had knowledge of the contents I did not.

Q. Now, did you search any place in your office at the Board of Trade Building, 131 State Street?

A. I have searched everything except some packages or a box.

Q. And which was it, a package or a box?

A. Well, I have both.

Q. There was one package, was there, or two packages?

A. There are two packages that I haven't searched.

Q. And were there any of the packages which you have searched?

A. Not that I knew that didn't relate to this subpoena.

Q. That is, those that you did not search you are positive that they had none of the records called for in the subpoena in this matter?

A. Yes, sir; that is right.

Q. Now, was there a box in your office that you did not search?

A. There was.

Q. And was there more than one box that you did not search?

A. There was.

Q. How big was that box?

A. Well, for a guess, it was three feet long—two and a half or three feet long—and about eighteen inches the other two dimensions.

Q. Now, were there any other boxes, bundles, or packages in addition to these three, namely, the two packages and one box, which you have not searched?

A. No, sir.

Q. That are in your possession?

A. [illegible]

Q. [illegible], have you ever seen—do you know what is inside those two packages?

A. I do not.

Q. Do you know what is inside that box?

A. I do not.

Q. Have you ever seen the contents of those two packages?

A. I never have.

Q. Or the contents of this box?

A. I never have.

Q. When did these two packages come into your possession?

A. I can not give you the exact date; approximately, September, 1910.

Q. You are pretty sure it is 1910 and not 1911?
A. I wish to correct that—pardon me—1911; yes, it was last year.
Q. And did the two packages come at the same time?
A. On the same day.
Q. But not at the same time of the day?
A. Not at the same time.
Q. And did the box come at the same time the package or either of them came?
A. No.
Q. Did it come after the packages came?
A. Yes.
Q. And about how long after?
A. Well, the first I knew of it was some hours afterwards.
Q. Some hours after on the same day?
A. On the same day.
Q. And when did it come into your possession?
A. It was delivered at my office and came into my possession
11 at that time, it may have been delivered at my office and hour or two before I saw it.
Q. And you are now referring to the office on State Street, are you?
A. I am, sir.
Q. 151 State Street?
A. Yes, sir.
Q. How was that box delivered to you?
A. I do not know; you mean by that the manual delivery?
Q. Yes.
A. I do not now know.
Q. You were not there in your office when it arrived?
A. No, sir; I was not.
Q. Who was there to receive the box?
A. Why, in the office there was one or two gentlemen.
Q. And who were they?
A. Either Mr. Theodore Harris or Mr. Williams—David Williams.
Q. How did you learn that that box was delivered there?
A. By seeing it.
Q. And what called your attention to it there?
A. Why, its visual presence.
Q. And did you know before that that it was there?
A. I knew before that that it was coming.
Q. And how did you know it was coming?
A. I have to decline to answer that on the question of privilege. It was a communication from a client, and in connection with that communication I was told that the contents of the package or box was delivered to me for the purpose of legal examination and to secure advice as attorney for the party.
Q. Who was the party that told you it was coming?
A. I think I shall have to decline to answer that on the ground that it might incriminate the party, and in our jurisdiction we rule,

or at least it is ruled in our courts, that the very fact that any
12 lawyer was consulted by any person for the purpose of his advice, that then it is privileged.

Mr. STURGISSON. Mr. Referee, I should like to ask you to rule upon this question as to whether he is privileged to refuse to answer that question. As I understand it, no attorney can refuse to give the name of the client who consults him. I am not asking at this time what the consultation was about; I simply asked the name of the person who spoke to him about the box.

Mr. KEARNS. Mr. Referee, that is a question that might well be held in abeyance for the present, I think.

(Decision reserved.)

Q. Was your knowledge as to the arrival of this box conveyed to you orally or in a written communication?

A. Orally.

Q. And after you received that communication did you notify any one in your office at 131 State Street to receive that box?

A. I do not remember that I did; I should say that I did not.

Q. And when you saw the box was it consigned to you—I mean was it addressed to you?

A. Yes, sir.

Q. And is that address still on the box?

A. Yes.

Q. And what is that address?

A. Mr. Walter B. Grant, either Board of Trade Building or 131 State Street.

Q. Is that written on the box or is it there in the form of a tag?

A. My memory is that it is on in the form of a card; it is pasted on, and that the writing is in typewriting.

Q. Does anything on the box indicate from whom it came or by what carrier it came?

A. No, sir; not that I saw.

Q. Now, did you have any conversation with Mr. McLean of Boston regarding that box?

13 A. No, sir; I never did.

Q. Did you have any conversation with Mr. McLean in regard to any box or package or bundles which he said were coming to your office, or he was sending to your office?

A. No, sir; I never did.

Q. Now, along about the summer or fall of 1911 did you have any talk with Mr. McLean in Boston?

A. Yes.

Q. Can you fix about the time—the first time you had a talk with him?

A. Well, Mr. McLean has been my client himself for some years and in addition to that he has been an agent for Mr. Elmer E. Burlingame.

Mr. STRATHEARN. I object to that, that he is the agent for Elmer E. Burlingame unless this witness knows of his own knowledge, and that part of the answer I move to strike out.

The WITNESS. I think I can say I know of my own knowledge certainly, by such evidence as would be accepted in court.

Q. In order to test whether you do know of your own knowledge I will ask you this: Did you learn that from what Mr. McLean told you?

A. I learned it from what Mr. Burlingame told me, and also from what Mr. McLean told me.

Mr. STRATHEARN. I think that is knowledge gained by hearsay.

The REFEREE. I will let it stay in the record for what it is worth.

Q. Now, when Mr. McLean first saw you did he consult you in the capacity of an attorney, that is, was he asking advice for his own guidance?

A. Do you mean years ago?

Q. I mean in this summer of 1911, the conversation first referred to?

A. Why, no, sir; I do not think he consulted me on his own business then.

Q. Then, in that first conversation that we have referred to that you had with Mr. McLean, that, I understand, was not with reference to any advice to be given to him as your client. Is that correct? That first conversation.

A. Why, undoubtedly during that period that you mention Mr. McLean saw me in connection with business of his own, and that would be, of course, in the affirmative, and he also saw me in connection with business of Mr. Burlingame, which was for Mr. Burlingame's business.

Q. Now, leaving out any conversation you had with Mr. McLean regarding his own business, regarding advice to him, regarding his own business, what did Mr. McLean say to you regarding Mr. Burlingame and his business?

A. I shall decline to answer that upon the ground that it is a privileged communication from the agent of Mr. Burlingame in regard to Mr. Burlingame's business and told to me for the purpose of obtaining advice concerning Mr. Burlingame's affairs.

Mr. STRATHEARN. Mr. Referee, I shall ask a ruling on this point also. As I understand it, a communication from a client to his attorney, when made to the attorney direct, that may be privileged, but here we have a case where it is through an agent, and that is not privileged.

Mr. KNIGHT. I do not so understand the law, Mr. Referee, and I think we can produce abundant authority on that.

Mr. STRATHEARN. And in the second place, I ask that he be required to answer, on the ground that there is nothing to show that Mr. McLean was Mr. Burlingame's agent.

The REFEREE. I will withhold my ruling on that for the present.

Q. Now, how many different conversations did you have with Mr. McLean during that summer or fall regarding Mr. Burlingame's business?

A. I should think one or two.

Q. Now, did Mr. McLean deliver to you, or say he was delivering to you, any boxes or bundles or packages?

A. He never did.

Q. Did he ever tell you that such packages or bundles or boxes had arrived or were to arrive for him and he wanted you to take care of them, or something to that effect?

A. Meaning any particular boxes or bundles or these that you have already referred to?

Q. If I recall aright, Mr. Grant, I think you stated he did not have anything to do with those that you have already referred to now.

A. Yes.

Q. Now, I am referring to any other boxes or bundles or packages.

A. I shall have to decline to answer for the same reason just stated—that if he did, they related to Elmer E. Burlingame's business and were delivered to me for the purpose of consultation.

Q. But I think you said no other bundles or packages were delivered to you?

A. No.

Q. Then, how can you say that these were——

A. You asked me whether there were any packages that were delivered.

Q. After he talked with you?

A. I would say there were none delivered to me in a manual sense.

Q. Did you direct the delivery of any boxes which Mr. McLean referred you to?

A. I did not.

Q. At one of these conversations with Mr. McLean did he deliver to you a bill of lading or shipping receipts for certain articles?

A. I decline to answer for the reason that if such were the case it would be a matter of privilege inasmuch as if he did it would be in my relation as attorney for Mr. Elmer E. Burlingame.

Q. Was Mr. McLean, as agent of Mr. Burlingame, seeking advice with respect to the delivery of any bill of lading to you or shipping receipt?

A. I decline to answer that for the same reason. I would state, however, for it might shorten your inquiry, that Mr. McLean never consulted me for Mr. Burlingame, to the best of my knowledge and understanding and belief, either about a bill of lading or in any other way concerning anything that would relate to The Ellsworth Company, or anything recited in this subpœna.

Q. Now, how do you know that is so?

A. Well, only from conversation with my client, Mr. Elmer E. Burlingame, and I decline to answer what that was for the same reason.

Q. Then as a matter of fact you do not know of your own knowledge——

A. No; I do not.

Q. All you know is what Mr. Burlingame told you?

A. Yes.

Q. Have you the subpoena which was served on you at El Paso, Texas?

A. Yes; and I now produce it, and will ask leave that it appear on the record.

Mr. STRAWBRIDGE. I offer it in evidence.

17 The paper referred to was marked "Government Exhibit No. 1."

The President of the United States to Walter B. Grant, % E. P. Coles & Bros., El Paso, Texas, greeting:

We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America for the Southern District of New York, at a district court to be held at the United States court-house and post-office building, Borough of Manhattan, city of New York, on the forthwith noon to testify and give evidence in regard to an alleged violation of the statutes of the United States by J. D. Smith and not to depart the court without leave hereof or of the district attorney, and that you produce at the time and place aforesaid, the following: Ledgers, journals, and cash books of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received, and copies of letters and telegrams sent by said company during the years 1907, 1908, and 1909.

And for a failure to attend and produce the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness, the Hon. Geo. C. Holt, senior judge of the United States District Court at the Borough of Manhattan, in the city of New York, on the 10th day of March, 1912.

18 (Sgd.) THOS. ALEXANDER, *Clerk.*

HENRY A. WISE,
United States Attorney for the Southern District of New York.

Mr. STRAWBRIDGE. Mr. Referee, I should like a ruling on the question I asked Mr. Grant, as to whether or not he received any bill of lading or shipping receipt from Mr. McLean in Boston.

Mr. FLANNAGAN. We object to his answering that question; in addition to the grounds that he has given, I will object to it on the

ground that it tends to disclose the whereabouts of such bill of lading, and whatever he knows in regard to its whereabouts is privileged.

(Decision reserved.)

Q. Now, Mr. Grant, after you did have a conversation with Mr. McLean, did you receive or dispose of or place or cause to be placed any boxes, bundles, or records which Mr. McLean referred to?

A. I shall decline to answer that for the same reason—that it is a matter of confidential communication with my client, Mr. Burlingame, and, to my knowledge, and to my understanding, and the best of my knowledge, it would not relate to anything called for in the subpœna, if such a thing existed.

Q. But whatever knowledge you have on that is what has been told to you by somebody else?

A. Just what I testified to before.

Mr. STEPHENSON. Now, Mr. Referee, I would like a ruling on that question. I do not think the attorney can take the books and records, even though they belong to his client, and place them in such a place without disclosing where they are placed—where such records are placed. I am not asking him to disclose any communication made to him by his client for the purpose of obtaining
19 advice. I am simply asking him what he did as a carrier or as a person who had the books or records in his possession.

(Decision reserved.)

Redirect examination by Mr. FLANNAGAN:

Q. Who is this Mr. Harris and Mr. Williams, to whom you referred?

A. Mr. David W. Williams is an attorney that was connected with this estate, a relative of one of the parties——

The REFEREE. The estate where you have this office?

The WITNESS. Yes; this office—this other office that I had.

Q. Was he associated with you?

A. He was not associated with me; he is in the office and does business there for himself; but if the door were open and anything came for me, he would receive it, of course.

Q. He acted for you, then, in your business there?

A. He would if anything came for me in that way, the same as I would if anything came for him.

Q. Mr. Grant, I understand you to say that you searched everything in both of your offices, except in the bundles and box to which you specifically referred.

The REFEREE. Two bundles and one box; is that right?

The WITNESS. Yes; two packages and one box, and the box I would say is nailed securely.

Q. Except in the two packages and one box that you have referred to, you have searched for the books and documents and papers called for by that subpœna?

A. Yes.

Q. And you found none?

A. No.

The WITNESS. I might state here also that I did not have the right under the circumstances under which this box or parcels were delivered to me; that I haven't undertaken *taken* to open them, and would not without the consent of my client, and he has directed me that I have no power to do so—my client, Elmer E. Burlingame.

Q. Now then, Mr. Harris whom you refer to, who is he?

A. Mr. Harris is an old gentleman, who was a schoolmate of Mr. Cotton, who is the testator under this trust.

Q. And he has an office in that place?

A. And he has the privilege of being there when he wishes to come in there.

Recross-examination by Mr. STEPHENSON:

Q. What is Mr. Harris' first name?

A. Theodore.

Q. An attorney at law?

A. No.

Q. What is his position there?

A. Why, he is simply an old gentleman that comes in there an hour or two in the afternoon; he is an invalid and a man past eighty years of age.

Q. Does he perform any work or services there?

A. At times he does; at times when I am away in connection with matters of the estate he does.

Mr. KEENEL. Representing you, you mean?

The WITNESS. Representing me as trustee or executor.

ELMER E. BURLINGAME, called as a witness on behalf, duly sworn, testified as follows:

By Mr. FLANNAGAN:

Q. Mr. Burlingame, are you the defendant in two certain indictments, or the accused, in two certain indictments found by the grand jury of the United States Court for the Southern District of New York, one against Elmer E. Burlingame and one Cove, and the second against James Dunlop Smith, The Ellsworth Company, and Elmer E. Burlingame?

A. Yes; and in the last DeForest and Darbey are also included in that.

Q. Now, what was this Ellsworth Company, Mr. Burlingame?

A. Well, it was an Arizona corporation.

Q. Now, Mr. Burlingame, there is a man named McLean, who lives in Boston. Do you know him?

A. I do.

Q. Has he ever been your agent?

A. Yes.

Q. Has he ever been your agent for the purpose of communication with Mr. Grant?

A. Yes.

Q. And was he such in 1911?

A. Yes; last year.

Q. Now, this Ellsworth Company, Mr. Burlingame, did you ever have any connection with that?

A. Yes.

Q. What was your connection with it?

A. Well, I was a director and president and treasurer of the company.

Q. Did you have anything to do with the stock?

A. Why, I had all the beneficial interests of the stock.

Q. Did any of the stock stand in the anybody elses name except your own name?

A. Well, there never was any stock—stock issued—that is, any stock certificates.

Q. There were never any stock certificates issued?

A. No.

Q. Well, were there any—was there ever any actual interest in the company except your own?

A. No.

Q. Now, is that company doing business to-day?

A. It is not.

Q. When was the last business the company did?

A. Why we stopped doing business as The Ellsworth Company, or we started to liquidate the company in about July, 1909, but
22 there were odd transactions that had to be disposed of that carried the business on until the last of the year 1909, and we closed the books on the 31st of December, 1909.

Q. As far as you know the company has never done any business since the end of the year 1909?

A. No; I do not know of any business the company has done since that time. There was a report filed with the internal revenue—the internal revenue report—with the collector of the internal revenue office, and my memory is that that was filed some time the last of March, 1910, but, of course, that referred to the year before, to the year 1909.

Q. What was done, Mr. Burlingame, in December, 1909, with reference to abandoning the company?

A. Well, I decided to abandon the company. In fact, that decision had been arrived at as I said, about July, 1909, and the last of December, 1909. I asked Mr. McIntyre and Mrs. Burlingame, each of whom had been the nominal holder of one share of stock of the par value of one dollar for that stock, they being stockholders, so that they might qualify as directors—I asked them to sign a paper turning over to me any interest they might possess, although it had been clearly understood——

Mr. STEPHENSON. I object to what was understood.

The WITNESS. Well, they signed those papers, simply an assignment.

Q. Now I show you a paper and ask you if that is one of the papers to which you refer?

A. Yes.

Q. And at what time was that signed?

A. That was signed the 31st of December, 1909.

Mr. FLANNAGAN. I offer that in evidence. It purports to
23 be signed by Mrs. Burlingame, and is dated December 31, 1909, and purports to be an assignment of Mrs. Burlingame's right, title, and interest to one share of the capital stock of The Ellsworth Company.

(The paper referred to was marked "Respondent's Exhibit A.")

Q. Now I show you another paper, Mr. Burlingame, and I ask you what that is?

A. Well, this is the assignment of Mr. McIntyre that is referred to there.

Q. Well, what happened at the time that you got that?

A. Well, I said to Mr. McIntyre that I thought it advisable to have a record so there could be no error or mistake about my owning all of the stock.

Q. Was anything said about the assets?

A. Well, at that time, or previous to that, I had said to Mr. McIntyre, and also to Mrs. Burlingame, that I proposed to take over everything, paying all the debts of the company, and taking over everything, and closing the thing up.

Q. And were these papers given you under that understanding?

Mr. STEPHENSON. I object to that, under that understanding.

Q. Under that conversation?

Mr. STEPHENSON. There is only one side of the conversation so far.

Q. Well, what did they say to that proposition?

Mr. STEPHENSON. I object to that on the ground that it is hearsay.

A. Well, they assented.

Q. Not that they assented, but what did they say? You needn't give the language, but the substance of what was said.

A. The substance would be, "That is all right; we agree to it."

24 Mr. FLANNAGAN. I offer this last paper in evidence purporting to be signed by C. H. McIntyre and dated December 31, 1909, and purporting to be an assignment of Mr. McIntyre's right, title, and interest in one share of the capital stock of The Ellsworth Company.

(The paper referred to was marked "Respondent's Exhibit B.")

Q. Now I show you another paper, Mr. Burlingame; did you ever receive that paper?

A. Yes; Mr. McIntyre handed that to me as president of the company.

Q. And about what time was that done, what date?

A. December 31, 1909.

Q. Now, was that at or about the same time that these two papers were handed to you?

A. On the same day, but earlier in the day.

Mr. FLANNAGAN. I will offer that paper in evidence, purporting to be a paper signed by C. H. McIntyre, dated December 31, 1909, and purporting to be a resignation to take effect immediately, addressed to the directors of The Ellsworth Company, resigning as secretary and director.

(The paper referred to was received and marked "Respondent's Exhibit C.")

Q. Now, after the signing of these two assignments, Mr. Burlingame, was there any stock whatever in The Ellsworth Company outstanding, except such stock as you had?

A. No.

Q. Now, did you act on this understanding that you had with Mr. McIntyre and Mrs. Burlingame in regard to the assets——

25 Mr. STEPHENSON. I object to his asking on the understanding he had with them.

The REFEREE. Ask him what he did.

Q. What did you do after you had this conversation with Mr. McIntyre and Mrs. Burlingame?

A. I paid the bills and took over everything in sight—all the assets of the company—as my own property.

Q. That was after the delivery of these papers in evidence to you?

A. Yes.

Q. Did that include the books of the company?

A. Yes; everything that the company had.

Q. Have you ever been subpœnaed to produce the books of The Ellsworth Company before the grand jury?

A. Yes; last December, I think it was.

Q. Are you willing that Mr. Grant should open any box or packages that he has in his possession for the purpose of disclosing their contents to the Government?

A. No; I have notified Mr. Grant not to open any box or bundles which he may have.

Q. Would the disclosure of the contents of such package or any package or box that Mr. Grant may have tend to incriminate you?

A. It might.

Q. And would you object to their being opened on that ground?

A. I should.

Q. And would you object to producing any package or box that Mr. Grant may have on the ground that it might tend to incriminate you?

A. I should and do.

Q. Now, if Mr. Grant has any of these books or papers called for by this subpœna from the Government, Exhibit 1, will you permit him to produce them?

A. No; not of my own free will.

Q. Why not?

A. They might tend to incriminate me.

Q. Would they, in your opinion, tend to incriminate you?

A. Well, I will answer that, in my opinion they might tend to incriminate me.

Q. Are you willing to produce any of the books or papers called for by that subpoena of the Government, Exhibit No. 1?

A. No; I am not willing to produce them.

Q. For what reason, or why not?

A. That they might tend to incriminate me.

Q. Now, you have referred to the taking over of certain books and papers on the abandonment of The Ellsworth Company. Are the books and papers called for by this subpoena, Government Exhibit No. 1, included in any of the papers or books so taken over by you?

A. They are all included.

Q. Now, Mr. Burlingame, in response to this subpoena which was served upon you to produce the books of The Ellsworth Company, did you appear before the grand jury?

A. I did.

Q. Now, at the time that you appeared before the grand jury, did you produce these books and papers called for by that subpoena, Exhibit 1?

A. I did not.

Q. Now, the subpoena issued to you by the Government was for identically the same books and papers as called for by Government Exhibit No. 1?

A. All but letters and telegrams which are covered here [indicating]—that is, letter files, containing letters and telegrams.

Q. In other words, the subpoena addressed to you called for everything contained in this subpoena, Government Exhibit No. 1, except the letters and telegrams?

A. Yes.

Q. Now, Mr. Burlingame, we have put in evidence here a paper purporting to be an assignment from Mrs. Burlingame to yourself of one share of stock, being respondent's Exhibit A. Was there any conversation with you at the time that Mrs. Burlingame acquired this interest that she then transferred?

A. Well, at the time, or about the time the company was incorporated, when I got the charter from Arizona, I found that it required that directors must be stockholders, so I said to Mrs. Burlingame that as a matter of form I wanted a share of stock issued to her to qualify her to act as director. I said, of course, I wanted this whole thing in my hands, and "you are not to get any benefit from this; it is merely a matter of form."

Q. What did she say?

A. Why, she assented; she said "I am agreeable," or words to that effect.

Q. And did you have any conversation on the same subject with Mr. McIntyre at the time he acquired whatever interest he had?

A. I had some conversation with Mr. McIntyre; yes.

Q. The same in substance?

A. In substance; yes.

Q. Now, I notice that no resignation as director has been produced signed by Mrs. Burlingame; how did that happen?

A. On that day, this 31st of December that this transaction took place, I called Mr. McIntyre in my room. His room was next to mine, and I told him what I wanted. Well, he evidently misunderstood me and he went out and brought back in a few minutes his resignation, but not an assignment. Later in the day I called his attention to the fact that the resignation was not necessary under the by-laws. That being simply assigned the stock, or his interest in the stock, that that automatically extinguished him as a director; consequently that night when I went home and had Mrs. Burlingame do the same thing I did not go through the formality of having her resign as director, knowing that her assignment of the stock, or of her interest, would render that unnecessary.

Q. Now, Mr. Burlingame, what time was this corporation organized—this Ellsworth Company?

A. My memory is the 8th day of January, 1908; that is, that was the date of the charter.

Q. Now, prior to that time had there been anybody doing any business, as far as you know, under the name of The Ellsworth Company?

A. Why, I had been carrying on my business for a number of months, or carrying on a business, a part of my business, under the name of The Ellsworth Company.

Q. Did you have any books of account?

A. Yes.

Q. But at that time there was no corporation at all?

A. No; no corporation.

By the Referee:

Q. These books related only to the particular part of your business that you did under the name of The Ellsworth Company; is that so?

A. I should presume so; of course, it is a long time ago, but I should say that whatever was in those books of account referred to the branch of the business that I was doing under that style.

By Mr. FLANNAGAN:

Q. Under that name?

A. Under that name.

Q. That would be your best recollection at the present time?

A. Yes.

Q. Now, could you say whether when the company—when the certificate of incorporation was obtained for The Ellsworth Company—whether or not these same books were continued in use by the corporation?

A. I do not belive I could state that positively; it is a long time ago—I don't suppose impressions go, do they?

Q. Give us your best recollection, whatever that may be, on the subject.

A. (Not answered.)

By the Referee:

Q. Don't you know when the corporation was organized whether you had a new set of books or whether you used the old ones?

A. No; I do not know. I know it was a continuation of the same business—of the same line of business—that is, the corporation was supposed to go right along with that part of the business.

Q. And you couldn't tell now whether, that being the same business, you opened a new set of books?

A. No; I couldn't tell you now.

Q. But after the incorporation those books, whatever they were, were the books of the corporation?

A. Yes; after the incorporation any new books that may have been bought and opened or started would be paid for out of the funds that were in the bank to the credit of the corporation.

Q. And those books contained the records of the corporation, or business of the corporation?

A. Yes.

By Mr. Flannagan:

Q. Now, Mr. Burlingame, at the time that you took the books and papers called for by this subpœna, Exhibit I, what was your understanding with reference to them at that time?

A. Well, my—inasmuch as I was paying the debts and cleaning things up and taking the assets as my own, my idea was to keep the books merely as a matter of protection, perhaps, against would-be creditors or any claims that might come up, so that I would have some evidence as to what had been paid.

Q. Well, what was your intention in taking over the books?

A. I took them as my own property.

Q. That was your intention?

A. Surely.

Cross-examination by Mr. Stephenson:

Q. Who were the incorporators of The Ellsworth Company?

A. I can not tell you, Mr. Stephenson, without looking at the charter, but I would say that I understand that there were two people in the office of the incorporating company that got the charter.

By the Referee:

Q. What do you mean by that—an incorporated trust company?

A. No, it was an Arizona company; I can not remember the names of the owners.

By Mr. Stephenson:

Q. Now, who were the first board of directors?

A. Mr. McIntyre, Mrs. Burlingame, and myself were named in the charter as being directors.

Q. And did they continue to be directors until December 31, 1909?

A. Yes.

Q. And how long—can you tell about when Mr. McIntyre and Mrs. Burlingame became directors?

A. Well, the organization meeting was held, I think, the 13th of January, about a week after the charter was granted.

Q. And that was held in New York, was it?

A. I think so—yes, in New York.

Q. What was the capital stock of the company?

A. $100,000.

Q. What was the par value of the shares?

A. $1.00.

Q. And 100,000 shares?

A. Yes, 100,000 shares of $1.00 each.

Q. And when, if at all, did you become the owner of any of these shares?

A. Well, at this organization meeting of the 13th of January, I became the owner of 99,996 shares.

Q. What did you pay for them?

A. By certain property of various kinds—some stock, some mining claims, and, I think, some furniture. There was a general lot of assets.

Q. And did you make a proposition to the board of directors to transfer this property for this 99,996 shares of stock?

A. The proposition, I think, was made by Mrs. Burlingame that she would turn over this property in exchange for these 99,996 shares of stock to be issued to her order.

Q. Then these different shares of stock, mining claims, furniture, and so forth, was Mrs. Burlingame's property, was it?

A. No, it was not her property; some of it was; some of the mining stock, I think, was in her name, but most of it belonged to me. It was in her name, but all belonged to me.

By the Referee:

Q. Mining stock, you say?

A. Yes, mining stock.

Q. Stock in other companies?

A. Yes, in other companies; and I do not think it was confined to mining stock, but it was various kinds of stock.

By Mr. Sunderman:

Q. Now, was there a certificate of stock for this 99,996 shares issued?

A. No.

Q. No certificate was issued to anyone?

A. No, no certificate was issued to anyone.

By the Referee:

Q. No certificates were issued to qualify the directors?

A. No; there were not.

By Mr. Stephenson:

Q. And no certificate was issued to you?

A. No; a bookkeeping entry was made on the books showing that one share each stood in the name of Mrs. Burlingame and Mr. McIntyre and the remainder of the stock in my name.

Q. And in what book was that entry made?

A. I think it would be the first entry, Mr. Stephenson, in the journal, that would be my recollection.

Q. Then a journal was opened when this company began business, which was different from the journal which you were doing business with under the name of The Ellsworth Company?

A. I do not admit that, but I would say that the first entry; that is, my bookkeeping judgment would tell me that the first entry after this company was started would be that journal entry, but I can not say whether it was entered in the old book or in a brand new book.

Q. Was there any stock ledger?

A. I do not remember any stock ledger.

Q. Now, at that first meeting, Mr. McIntyre was elected secretary, was he?

A. Yes.

Q. And you were elected president and treasurer?

A. Yes.

Q. Did the company ever pay any dividend?

Mr. Knight. I do not see just the bearing of that question upon this inquiry that we are here on now.

The Referee. No; but we want simply to find out what the company did.

The Witness. My judgment is that no dividend was ever declared for quite a simply reason.

Q. What was that reason?

A. There were never any meetings of the directors to declare dividends.

The Referee. No meetings of the directors at all.

The Witness. No.

Q. Now, at the time Mr. McIntyre was elected secretary, did you receive from him his resignation undated?

A. No. I have done such things, but not that time.

Q. Now, when was the time that you did receive the resignations from him, dated or undated?

A. The 31st of December, 1900, and it was dated on the day on which it was signed.

Q. How do you fix that date?

A. Why, the fact that I was very anxious to close the company, so as to button up the thing, you might say, in the face of the

internal-revenue act, and we did it on the last day, cleaned up everything that day, the 31st of December.

Q. You spoke of this report that was filed with the collector of internal revenue in March, 1910. Did you prepare that report?

A. No.

Q. Did you see it before it was filed?

A. Yes; I signed it as president and treasurer.

Q. Did Mr. McIntyre sign it, too?

A. I think not. You see the blank provided that it was to be signed by the president and treasurer, and even if he had been the secretary then he wouldn't have been required to sign it.

Q. Now, you say that you took over all of the property of the company and agreed to pay its debts; is that correct?

A. Yes.

Q. Was such an agreement entered into with the board of directors?

A. No; I told them that I was going to do it and did do it.

Q. Did the company have many debts at that time?

A. No; practically nothing.

Q. Now, you said that it might incriminate you if these books were opened. You didn't mean that, did you?

A. Well, I mean that anything that might tend to disclose the whereabouts of these papers or books named in this subpoena that I have talked about might furnish a link in the chain that eventually would incriminate me.

Q. Now, you say that when the company was incorporated you found that the directors must be stockholders. Was that in certificate of incorporation or in the by-laws?

A. In the certificate of incorporation.

Q. And then when you had this stock issued to Mrs. Burlingame and to Mr. McIntyre you were not endeavoring to fulfill the law, but to get around it, weren't you?

A. I was endeavoring to comply with the requirements or conditions imposed in the charter.

Q. That is, in letter and not in spirit. Now, coming back to Mr. McLean. When did you appoint him your agent?

A. I cannot tell you the date.

Q. And how did you appoint him?

A. Well, I said to him, "Mack, I want you to do so-and-so for me."

Q. Well, what did you tell him?

A. Well, among other things I told him I wanted him to talk to Mr. Grant, my attorney.

Q. And where was this you told him that?

A. In Boston.

Q. Now, did you give him a written communication?

A. Could I say in answer to that that I decline to answer because if I gave him a written communication, and that being disclosed

and found, it might form a link in the chain that would tend to incriminate me?

The Referee. I think that is too remote. I think I will ask you to answer that question.

A. No; I did not.

Q. Now, where in Boston did you see him?

36 A. Well, Mr. Stephenson, I have seen him in Boston at various places and I do not believe I could tell you the exact place that I saw him when I gave him this instruction.

Q. Well, what are some of the places there that you saw him?

A. Well, in his own office.

Q. And where is that?

A. On Beacon street, either 2A or 1A, I cannot say, and in the Parker House, which is close to his office.

Q. In which place did you see him first?

A. Well, as I tell you——

Q. First in the summer or fall of 1911, I mean.

A. I do not believe I could answer that. I saw Mack so many times and so many different places that I couldn't tell you.

Q. Now, when you first appointed him your agent, where did you see him?

A. Well, agent for this particular—what particular transaction?

Q. Well, any transaction in the summer or fall of 1911.

A. You mean regarding Mr. Grant. Shall I confine myself to that?

Q. Yes; regarding Mr. Grant.

A. I should say in his office.

Q. When was that?

A. It was about the last of August, 1911; I cannot tell you the exact date.

Q. And what time of day?

A. I should say in the morning.

Q. Was anyone else present?

A. Nobody else was present to hear what I said that I can remember; I am quite positive of that.

37 Q. And what was the substance of your conversation with Mr. McLean when you saw him that morning in August, 1911?

A. I think I ought to decline to answer that, on the ground that the communication, if disclosed, might tend to incriminate me.

Mr. Stephenson. Mr. Referee, this witness has testified that he appointed Mr. McLean his agent. Now, it might have incriminated him to answer that question, but having answered it *but having answered it*, he has waived his privilege in so far as he answered it, and I have the right to cross-examine him upon that point to find out whether or not he really did appoint him as his agent.

The Referee. Yes; I think you have a perfect right to do that to determine whether or not Mr. McLean was the agent of Mr. Bur-

lingame, but you cannot get at that by a question that would go to the essence.

Q. Now, what did you say to him with respect to his acting as agent for a communication to Mr. Grant?

A. In my judgment, I ought not to answer that question.

By the Referee:

Q. Leaving out everything that might possibly tend to incriminate you, how was it that Mr. McLean happened to be your agent? You said he was your agent for the purpose of talking with your lawyer, didn't you?

A. Yes.

Q. Now he is inquiring into that fact, inquiring into the fact as to whether he was really your agent, and he is asking you to
39 give him the details so he will know either that Mr. McLean was or wasn't your agent. We want to know whether or not, when Mr. McLean interviewed your lawyer, Mr. Grant, he was interviewing him as your representative with your authority and pursuant to your request to do so—we want to know that, whether he did or not.

A. Well, I have no personal knowledge that Mr. McLean interviewed Mr. Grant; that would be my answer to that question as it is put.

By Mr. Stephenson:

Q. Now, what did you say to Mr. McLean with reference to your appointing him to act as your agent for an interview with Mr. Grant?

A. May I ask this question? I understand that I need not if I claim privilege, need not say what I said or what I wanted him to say to Mr. Grant?

Q. Now, I did not ask you that.

A. Then I will say that I asked Mr. McLean to go and see Mr. Grant and ask him certain questions.

The Referee. And you don't know whether he ever did or not?

The Witness. No.

Q. You feel very sure that you asked Mr. McLean that, do you?

A. Yes.

Q. And you specified to Mr. McLean the question that he was to ask Mr. Grant?

A. Yes; I told him what I wanted him to find out.

39 Q. And did you also request Mr. McLean to report, to get advice from Mr. Grant on those questions?

A. Yes.

Q. Did you request Mr. McLean to report that advice to you?

A. Surely.

By the Referee:

Q. Did you ever see Mr. McLean after you had asked him to have this interview with Mr. Grant?

A. Yes; I have seen him.
Q. You saw him from time to time after that?
A. Yes.

By Mr. STEPHENSON:

Q. And did he then give you any advice from Mr. Grant?
A. I do not think I ever asked him to report.

By the REFEREE:

Q. Well, did he ever report?
A. I should say not; I should say he never reported by written report or by verbal report.
The REFEREE. That means he never reported at all, then.
Mr. KEENAN. Do you wish to explain that answer further?
The WITNESS. I do not see how I can explain it.

By Mr. STEPHENSON:

Q. Now, on this morning of August, 1911, when you saw Mr. McLean, did you also see Mr. Grant that day?
A. I do not think so.
Q. Did you see him the day before?
A. I think not.
Q. Did you see him the day after?
A. I think I saw afterwards.
Q. The day after?
A. I think it was the day afterwards or the day but one.
Q. And did you stay in Boston from the time that you saw Mr. McLean until the time that you saw Mr. Grant?
A. I think I ought not to answer that.
Mr. KEENAN. Why not?
The REFEREE. Oh, answer that.
The WITNESS. I couldn't answer it without consulting my memorandum.
The REFEREE. You mean to say you don't know,
The WITNESS. No.
Q. Well, you can consult your memorandum.
A. I haven't it here.
Q. What memorandum did you make?
A. Well, it wouldn't be in the shape of a diary; it might be in the form of letters or copies of letters, so that I might know where I was when I wrote them.
Q. Did you stay in or near Boston during that time?
A. Yes; I will grant you that.
Q. Now, why did you use Mr. McLean as an agent to consult Mr. Grant when you were right in town and not far from Mr. Grant's office?
A. For the reason that I imagined that every step I took was being watched by your agents.
Q. And you thought it would hurt you more to be consulting Mr. Grant than to be consulting Mr. McLean?
A. No; not at all.

Q. Well, what was the reason?
A. That was the reason.
Q. And you didn't want to be seen consulting Mr. Grant?
A. I did not want just at that juncture to go to Mr. Grant's office.
Q. And you preferred to send oral communication by Mr. McLean rather than to go to Mr. Grant, or sending him a letter with your inquiries?
A. Well, you may put it that way.
Q. Now, did you give Mr. McLean any memorandum, any written questions, or any memorandum on the questions that he was to get advice from Mr. Grant on?
A. No.
Q. And you never took the trouble to have Mr. McLean report that advice to you?
A. No.
Q. Did you pay Mr. McLean for this agency?
A. Yes; I think I did; I think it is safe for me to say I did.
Q. Did you pay him on that morning or afternoon of August, 1911, when you first saw him?
A. I think not.
Q. Did you agree to pay him?
A. I think I paid him before that.
Q. Then, before the morning of August, 1911, you had arranged with Mr. McLean to act as your agent in a communication with Mr. Grant, had you?
A. No; I had sent him some money.
Q. Sent him some money?
A. Yes.
Q. Was that money in payment of services for him to take
49 some communication to Mr. Grant afterwards?
A. It wasn't specified.
Q. Well, was it whether it was specified or not specified?
A. At any rate, he kept the money.
Q. Well, was the money sent for that purpose?
A. Well, it wasn't specified so.
Q. As a matter of fact, was not this first money you sent to Mr. McLean a loan to him?
A. No.
Q. Was it in payment for services?
A. I think I must decline to state what it was for.
Q. On what ground?
A. On the ground that a disclosure might form a link that would tend to incriminate me.
Q. Mr. McLean was not in your employ, was he?
A. How do you mean?
Q. Well, was he working for you as an employe?
A. Not on a salary.
Q. When you saw Mr. McLean on that morning of August, 1911, did you stay with Mr. McLean most of that morning?

A. No, I did not stay with him but a short time.
Q. And were you there to see him that afternoon?
A. My impression is that I was.
Q. And when did you give him these questions to ask Mr. Grant—in the morning or in the afternoon?
A. I should say both times.
Q. For how long a time did you see him in the morning?
A. Oh, I may have been there an hour.
Q. And did you spend most of that time getting these questions ready for him to propound to Mr. Grant?
A. No, we were talking on other matters the great bulk of the time.
Q. How long a time did it take you to deliver to Mr. McLean these questions that he was to inquire about from Mr. Grant?
A. Not very long.
Q. Where were you between the time that you saw Mr. McLean in the morning and when you saw him again in the afternoon?
A. Well, I was around Boston.
Q. Where in Boston?
A. Oh, I cannot tell you that; I was in a great many places; I have a good many friends there; and I had three boys there.
Q. Did you see Mr. Grant between that time—between the morning and afternoon when you saw Mr. McLean?
A. No.
Q. Did you call at his office?
A. No.
Q. Did you telephone him?
A. No.
Q. Did you arrive in Boston that same day that you saw Mr. McLean that morning, August, 1911?
A. Well, my impression is I did.
Q. And where did you arrive from?
A. Well, I think I better not answer that unless I am directed to.
Q. On what ground?
A. The first ground is I cannot see what bearing it has on this question.
Mr. FLAHAGAN. We object to it on the ground it has no bearing on this matter at all.
Mr. STRATHEARN. I won't press it if that objection is raised.
Q. Now, when is the next time after this morning in August, 1911, that you saw Mr. McLean?
A. I think I saw him the next day.
Q. In the morning?
A. I should say so; yes; in the morning.
Q. When you saw Mr. McLean the next day had he at that time carried your questions to Mr. Grant?
A. I do not know.
Q. Did you ask him?
A. I did not ask him.

Q. Did you ask him whether he had gotten the advice that you wanted from Mr. Grant?

A. No.

Q. And did you put some more questions to him to take to Mr. Grant on this second day that you saw him?

A. I do not think so.

Q. Did you request him again to see Mr. Grant regarding these questions?

A. No; I do not think so.

Q. And you didn't ask him whether he had seen Mr Grant?

A. No; I do not remember that.

Q. Now, on that second day did you yourself see Mr. Grant?

A. Well, I am not positive whether I saw him that day or the following day.

Q. Now, the third day. Come to the third day. Did you see Mr. McLean that third day?

A. Yes; I saw him the third day.

Q. Was that in the morning or afternoon?

A. I would say in the morning.

Q. And did you then ask him whether he had obtained this advice from Mr. Grant?

A. I do not think I asked him.

Q. Did you give him any other questions to propound to Mr. Grant?

A. Not at that time; no.

Q. And that same day did you see Mr. Grant yourself?

A. Yes; I saw Mr. Grant; it was either that day or the day before—I am trying to be as explicit as I can. My impression is it was the third day I saw Mr. Grant.

Q. Either the second or third day you saw Mr. Grant?

A. Yes.

Q. And then you consulted him in a professional capacity?

A. Yes.

Q. Now, that was the third day. Now, when was it you next saw Mr. McLean?

A. I could not answer that; I don't know.

Q. About how long after?

A. I don't know.

Q. Well, did you see him again that fall, 1911?

A. Yes; I was in Boston several times between that time and the 1st of January, and I saw Mack every time I was there, because we have known each other a great many years and I always went to his office when in Boston.

The REPORTER. Mack is McLean?

The WITNESS. Yes.

Q. Now, the next time you saw him what conversation did you have with him?

Mr. FLANNAGAN. I object to that. It has nothing to do with the agency.

Q. What conversation did you have with Mr. McLean in reference to his acting as agent for the carrying of communications to Mr. Grant on this next time that you saw him after this third day in August, 1911?

A. I do not think I had any further conversation with him regarding that point.

Q. Had the agency terminated then?

A. I do not think so.

Q. Well, did you deal with him as agent?

A. Well, now, you are——

The REFEREE. He means as your representative.

The WITNESS. As my representative, you mean, relating to Mr. Grant?

Q. Yes.

A. No; I think not. I think the instructions I gave him at the first interview, on the first day, were quite sufficient.

Q. Did you instruct him; what do you mean by instructions?

A. I instructed him to go and see Mr. Grant.

Q. Did you tell Mr. McLean to do anything in addition to carrying a communication to Mr. Grant?

Mr. KEENAN. I object to that.

(Question withdrawn.)

Q. Now, did you send any letters to Mr. McLean after this interview in August, 1911?

A. Yes.

Q. And what did you tell him in those letters?

A. I decline to answer that.

Q. On what ground?

A. That it might tend to incriminate me.

Mr. KEENAN. We object to it except in so far as it may relate to the instructions about the agency.

Q. Were there any instructions in that letter in regard to the agency of Mr. McLean?

A. Now, are you all the time referring to the agency for communication with Mr. Grant?

Q. Yes.

A. I do not think there was anything in any of those letters referring to that, Mr. Stephenson.

Q. Well, then, in what way can you say that Mr. McLean continued to be your agent at that time for the purpose of taking communications to Mr. Grant? Were you giving him any communications to take to Mr. Grant either by letter or otherwise?

A. No; I was not giving him any communications by letter to take to Mr. Grant.

Q. Were you giving him any communications orally?

A. And after that first time I do not remember of any oral communications to take to Mr. Grant.

48 Q. Now, these books and records called for in this subpœna, were they kept by The Ellsworth Company from a time shortly after its incorporation until December 31, 1909?

A. Well, they were kept under the direction of Mr. McIntyre, he was the secretary of the company.

By the Referee:

Q. From the date of its organization?

A. Yes.

Q. Until the end of 1909?

A. Yes—now I do not know as Mack made all the entries. This is another Mack. This is McIntyre, but it was under his general direction.

By Mr. Stephenson:

Q. Those were the books of The Ellsworth Company?

A. Yes.

Q. Now, about the time that you decided to liquidate The Ellsworth Company you formed certain other corporations known as The Ellsworth Corporation, did you not, in New Jersey and in New York?

A. Yes.

Q. Now, did not these Ellsworth corporations, one or the other, take over the assets of The Ellsworth Company?

A. In July, 1909, one of the Ellsworth corporations—that was part of the title, the word "corporation" to distinguish it from the company—took over some of the assets in the shape of furniture and office fixtures, but——

The Referee. Took it over from The Ellsworth Company?

The Witness. Took it over from The Ellsworth Company.

49 That would be my memory. My memory is we had an office at 49 Exchange Place, and I think the lease had previously been in the name of The Ellsworth Company, and was transferred on the consent of the building to The Ellsworth Corporation, and the furniture that was in that particular suite of offices, and the fixtures, and so forth—that is my best memory.

By Mr. Stephenson:

Q. Were transferred to The Ellsworth Corporation?

A. Yes.

Q. Was that The Ellsworth Corporation of New Jersey or New York?

A. I think that was the New York corporation.

Mr. Flannagan. What year was that?

The Witness. I think it was 1909, about July or August.

Q. And was that done by a bill of sale?

A. Yes.

Q. And what did that furniture consist of?

A. I couldn't remember, Mr. Stephenson.

Q. Well, roughly, what was it?

A. I won't say that. There were a number of safes in the office.

Q. Who had charge of them?

A. I can not say. You must remember, Mr. Stephenson, we were doing a rather large business and it was absolutely impossible for me to be personally acquainted with all the details of the business. Many things came in there and went out and were paid for that I did not know anything about at all. It was simply all done in the course of business.

Q. Were there many things paid for that you did not authorize?

A. Oh, yes.

The REFEREE. You mean by The Ellsworth Company?

The WITNESS. Many things were paid for. Mr. McIntyre had the power to draw money from the bank as secretary, and he had the general charge of the disbursements?

The REFEREE. Well, then, he was actively engaged in the management of The Ellsworth Company with you?

The WITNESS. Oh, yes.

Q. Was the business of The Ellsworth Company carried on by another company?

A. Well, a portion of the business of the—that had been done by The Ellsworth Company, a portion of it was carried on by another company, but the main bulk of the business simply died with the Radio Telephone Company and those other stocks, when they were taken off the market. It simply extinguished itself.

Q. Now, why did you decide to liquidate The Ellsworth Company?

A. Why, the first inception of the idea came from the fact that there was a printing company or a publishing company or a book concern, something of that sort that had been doing business here for a long time under the name of The Ellsworth Company. When we made an attempt to qualify under the foreign corporation act, why, we were told at Albany that we couldn't be admitted owing to the fact that there was another corporation here under the same title, and also we found that these people were getting our mail and we were getting theirs.

The REFEREE. You are talking about The Ellsworth Company of Arizona?

The WITNESS. Yes; and we were growing larger, and of course, at first when we started in doing business it didn't seem to matter much. Of course, we didn't get our admission in Albany; then with regard to this mix up of the mail, when it had grown very big, our mail, we had a great deal of annoyance from it and so we decided that the thing to do was to organize an Ellsworth corporation, and after some trouble at Albany, they feeling that the name was so near to the other one that the charter ought not to be issued, but it was finally decided there that they would issue it.

Q. And wasn't the idea of The Ellsworth Corporation to take over the business of The Ellsworth Company?

A. Originally, the idea, undoubtedly at that time in July when the company was organized, was to take over the business, but we very soon found that it was inexpedient to do it, due to a decision that was rendered by some of the high courts regarding this tax business on stock sold in New York, you know, the transfer tax. Consequently, on advice of counsel, a new corporation, The Ellsworth Corporation of New Jersey was formed, the idea being to have the stock business, that is, to have the stock issued over there instead of in New York.

Q. Well, that transfer tax law didn't have anything to do with the new Ellsworth Corporation taking over the business of The Ellsworth Company, did it?

A. No; but the point is, suppose we had sold a million dol-
56 lars worth of stock and had passed them through the New York office, why we would have to pay a tax to New York, and therefore we went to New Jersey.

Q. But what was the objection to transferring the business of The Ellsworth Company to The Ellsworth Corporation in New Jersey and letting that company carry on this business in New Jersey and transfer its stock there?

A. Well, I found out through some communications or through some of our agents that the name of The Ellsworth Company was not in good odor in the West, and I thought the thing to do was to absolutely close it out.

By the Referee:

Q. That is, you closed out the business that was carried on under the name of The Ellsworth Company?

A. Yes; and I might say that The Ellsworth Corporation of New Jersey had in the meanwhile picked up other business, which I suppose, had The Ellsworth Company been in existence would have been transacted by it.

Q. Well, it was the name only that was in disrepute?

A. Yes.

Q. Then that wouldn't be any reason why the same business shouldn't be carried on under another name?

A. No, sir.

By Mr. Stevenson:

Q. Then why didn't you transfer the business of The Ellsworth Company to The Ellsworth Corporation?

A. Well, I didn't feel that I wanted to do it; I didn't feel
57 that it was good business to do it.

Q. Well, that was the original intention, was it not?

A. Yes; there is no question but what when the organization of The Ellsworth Corporation of New York was first thought of it was the intention to carry on its business.

The Referee. And that was organized prior to the organization of The Ellsworth Corporation of New Jersey?

The Witness. Yes.

The REFEREE. And when The Ellsworth Corporation of New Jersey had been organized was there a change in respect to carrying on the business then?

The WITNESS. Yes; you see in the meanwhile, Mr. Smith, of The Radio Telephone Company, the president of the company, had—well, he and I disagreed, and I had determined to cut out wireless entirely.

Q. What was the business of The Ellsworth Company?

A. The Ellsworth Company was selling stock of several wireless companies—selling stock to the public.

By the REFEREE:

Q. That was its principal business?

A. Yes.

Q. And then what was the principal business of The Ellsworth Corporation of New York?

A. The Ellsworth Corporation of New York was merely to buy up furniture. If you allow me to say it, it merely had an office there, and it was a habitation of a number of other businesses.

Q. And then the New Jersey company, what was its principal business?

A. The New Jersey corporation took on the selling of stock of a number of other enterprises that were not in any way connected with wireless. My idea was inasmuch as the wireless—through this wireless it was coming into disrepute—my idea was to kill The Ellsworth Company, eliminate it and not mix things up.

Q. Then did you organize The Ellsworth Corporation of New Jersey?

A. Yes.

Q. Or the New York company?

A. Yes; I caused it to be organized.

Q. And did you also cause The Ellsworth Corporation of New Jersey to be organized?

A. Yes.

By Mr. STEPHENSON:

Q. Now, did you get a bill of sale from The Ellsworth Company of these books?

A. Do you mean a written bill of sale?

Q. Yes.

A. No.

Q. Was there a meeting of the board of directors held for the purpose of transferring title to you?

A. No; there were none at that time, Mr. Stephenson.

The REFEREE. He says no meeting of The Ellsworth Company of Arizona was ever held after the first meeting.

Mr. KNIGHT. And at the last there were no directors because they had turned in their stock.

The REFEREE. Yes; and therefore they were disqualified.

Now, did you own all of the stock of Ellsworth Corporation of New York except the qualifying shares?

The WITNESS. I do not think there were any qualifying shares under this State. I think the charter specified that the directors did not need to be stockholders.

By the REFEREE:

Q. And did you own all the stock?

A. I think I controlled it all.

Q. And the same with the New Jersey company?

A. Yes.

By Mr. STEPHENSON:

Q. Now, can you fix about the time that these Ellsworth records or the records of The Ellsworth Company were moved over to Jersey City?

A. I do not think I said the records of The Ellsworth Company were moved to New Jersey.

Q. Well, now, did they remain in the New York office?

A. I think for a time they did.

Q. And until when did they remain there?

A. Well, I could only answer by refreshing my memory.

Q. Well, about when?

A. I should imagine about July 19th—some time in July.

The REFEREE. July of what year?

The WITNESS. 1910.

Q. Where did the books go in July, 1910, the books and records of The Ellsworth Company?

A. I decline to answer that.

Q. On what ground?

A. On the ground it would lead to the tracing of the books of the company, which, if discovered, might tend to incriminate me.

Q. Then, they did stay in the New York office until about July, 1910.

A. I think so.

Q. And about that time they were removed from the office; is that correct—July, 1910, the New York office?

A. Mr. Stephenson, I cannot tell you.

Q. Now, you say these books were closed up. Who closed them?

A. Why, acting under my orders, Mr. McIntyre either would have closed them or caused them to have been closed.

Q. And that was in December, 1909?

A. Yes.

Q. And did he close them in the New York office?

A. I do not know where he closed them.

Q. Well, did you tell him to close them?

A. Yes.

Q. Where did you tell him he would find the books to close them?

A. I did not tell him.

Q. You are sure they were not in the New York office?

A. No; I am not sure about that, Mr. Stephenson.

Q. I understood you to say that you are sure they left the New York office in July, 1910.

A. My impression is they did, but I am not sure of it. The fact is that I was a very busy man and I couldn't be acquainted with everything that went on.

61 Q. Did he close them in December, 1909, or some time in 1910?

A. Well, I do not know. My instructions to him were to close the books and wipe the thing out, so that we could make this revenue report, and that would be the last report we would ever have to make, and that there mustn't be a single thing, a single transaction after the 31st of December, 1909.

Q. Now, wasn't that closing actually done shortly before you made that report to the collector of internal revenue in March, 1910?

A. I do not think so, although I cannot see even if it were as a bookkeeping transaction, transactions that perhaps had not been written up, that that would make any material difference, but my impression is that it was all closed according to instructions.

Q. Now, about when was that report to the internal-revenue office verified; was that verified some time in March, 1910?

A. How do you mean by verified?

Q. Sworn to?

A. Yes; I think it was sworn to—oh, I will say ten days before the 1st of April, when it was due to be filed.

Q. And at that time did you not have access to the books of The Ellsworth Company?

A. No. That is, you mean personally?

Q. Yes.

A. No, Mr. Stephenson; for a year I never looked at the books.

Q. You then told Mr. McIntyre to make up this report according to law and bring it to you?

A. Yes.

Q. And didn't you tell him where to find the books?

A. No.

Q. How did he know where they were?

A. I do not know.

Adjourned to Saturday, April 27, 1912, at 10.30 a. m.

62 United States District Court, Southern District of New York.

In the Matter of the Alleged Contempt of Walter B. Grant, an Attorney at Law.

Before Edwards H. Childs, Esq., referee.

New York, *April 27, 1912.*

Appearances: William A. Kesner and Dallas Flannagan, attorneys for Walter B. Grant; Henry A. Wise, United States attorney, for

the Government; Robert Stephenson and Raymond G. Brown, of counsel.

ELMER E. BURLINGAME, recalled.

By Mr. FLANNAGAN:

Q. Are there any corrections you wish to make in your testimony?

A. Yes; there are some.

Q. You stated at page 26 that there was a provision in the charter that the directors must be stockholders. Is that correct?

A. No; that was a mistake on my part.

Q. I am referring to the company of Arizona.

A. Yes.

Q. You also stated that there were 99,998 shares paid for by property. Is that correct?

A. That was a mistake; it was 99,997.

Q. That left three shares?

A. Yes, sir.

Q. What was done to those three shares?

A. I paid for those in cash.

Q. You are referring still to The Ellsworth Company of Arizona?

A. Yes.

68 Q. You seemed to say at page 30 that the furniture which did not go to The Ellsworth Corporation was moved to Jersey City. Is that correct?

A. No; I did not intend to say that.

Q. That is, referring to the furniture of The Ellsworth Company of Arizona, what did you intend to say?

A. Well, in July and August, or thereabouts, 1900, there was a general rearrangement of the furniture and some of it taken to Jersey City, but not all of it.

Q. At page 49 you seemed to indicate that the bill of sale from The Ellsworth Company to The Ellsworth Corporation of New Jersey was made about July, 1900. Is that correct?

A. No; that is not correct.

Q. I show you a certified paper purporting to be a certified copy of that.

Mr. STEPHENSON. I have the original here.

Q. We will take the original. I show you a paper in place of a certified copy, produced by the register, at Mr. Stephenson's request, from the records, and ask you if that is the document to which you referred?

A. Yes.

Mr. FLANNAGAN. I offer in evidence a certified copy of a document previously obtained.

(Paper marked "Respondent's Exhibit D" of this date in evidence.)

Mr. STEPHENSON. Is the certified copy there is the seal—a copy of the seal?

Mr. FLANNAGAN. Yes.

The Referee. The stenographer will note on the certified copy that the seal of The Ellsworth Company should contain the word "The" as part of the name of the corporation.

(The referee returns the copy of the subpœna marked "Government's Exhibit 1" to Mr. Grant, with the consent of the parties, a copy thereof being in the record.

Q. Now, Mr. Burlingame, I call your attention to page 59 of the stenographer's minutes, in which you refer to the date 1909, in the second line from the bottom. Is that the correct date, as 1909?

A. No; that should be 1910.

Q. Just look at page 60, the sixth line from the top, and see if the same error has not occurred there.

A. Yes; that date, July, 1909, should be changed to 1910.

Q. And look at the third line from the bottom on the same page, to wit, page 60, and see if that should also be changed as the same mistake.

A. Yes; the date should also be 1910.

Q. At page 19 I notice the name is spelled "Drabey." That should be something else?

A. I referred to Mr. Darby.

Q. Then, Mr. Burlingame, you said you made some error in regard to the Jersey Corporation—that is, The Ellsworth Corporation of New Jersey—taking over the business of The Ellsworth Company of Arizona.

A. I think I left the impression—I can not remember the exact language—I think I left the impression that the Ellsworth Corporation of New Jersey did not carry on a portion of the business that previously had been carried on by The Ellsworth Company of Arizona—the Arizona corporation. The fact is that The Ellsworth Corporation of New Jersey did take up and carry on a portion of the business that previously had been done by The Ellsworth Company of Arizona.

Q. Was it a portion of the business or some of the business?

A. Well, it was some of the business; there was no formal agreement or transfers, as I remember it, between the two corporations.

Q. Did Mr. Burlingame deliver to you or say he was delivering to you any boxes or bundles or packages—that should be McLean, on page 19?

A. Yes, sir.

Cross-examination continued by Mr. STEPHENSON:

Q. Mr. Burlingame, I think you testified at the last hearing that you had forbidden Mr. Grant to open that box. Is that correct?

A. Yes.

Q. When did you forbid him to open the box?

A. I can't tell you the date, Mr. Stephenson.

Q. Well, about when?

A. Did I testify to that exactly? Will you please read me the particular answer?

Q. You testified on page 24:

"Q. Are you willing that Mr. Grant should open any box or package that he has in his possession for the purpose of disclosing their contents to the Government?

"A. No; I have notified Mr. Grant not to open any box or bundles which he may have."

A. Do I understand that that opens the door?

Q. I don't know what the understanding is; I am cross-examining you on your direct testimony.

A. Well, I would say that at a time when I personally delivered to Mr. Grant some packages of paper I told him that they were for the purpose of being used in my defense, and that when we got ready and the time came that we were ready to consider the questions and go over them; that we would then open them, and I wished that they would not be opened until then; or it was language to that effect; I don't know and I can't say that I used that language.

Q. When did you tell him not to open it?

A. I should consider that that conversation would be in the line of a request not to open, or an order.

Q. What was the order which you gave him about opening them or not opening them?

A. I have stated it, in effect.

Q. Well, state it again.

A. Well, that there was no need of our going over the contents at that time, but we would do so some later time when he had time to devote to a thorough examination and going into the question that was brought up by some remark that he had made about there not being time then to go through the matter.

Q. You simply said that you said there was no need of opening, but when did you forbid him to open them?

A. I should consider that a forbidding, or I might have been unwise in my choice of words.

Q. Did you forbid him to open them?

A. I should say so; that is, I think it was equivalent.

Q. And when did you?

Mr. KNOWLTON. Has he answered that?

Mr. STEPHENSON. No.

The REFEREE. He may answer it.

Q. When did you do this?

A. I should say it was some time early in September.

Q. 1911?

A. 1911.

Q. And at that time you told him not to open the boxes or bundles?

A. Well, whatever was delivered to him.

Q. And that was at the time of their delivery?

A. I should say that it was after that delivery, at another time or perhaps the same day.

Q. The same day of the delivery?

A. I am not positive about that.

Q. If it was not the same day it was a few days after, was it not?
A. It would be in the immediate neighborhood or the immediate time.
Q. Have you ever told him since that time in September, 1911, not to open this box or bundles?
A. I think I have.
Q. When was that?
A. I don't remember the date.
Q. About when?
A. I cannot remember the time.
Q. Can you remember the year?
A. Well, I think it was this year.
Q. 1912?
A. Yes.
Q. Was it within two months?
A. I should say so.
Q. Did you tell him personally or by letter or by telegram?
A. I think I want to correct that answer. I think I told him that I did not want him to divulge anything they I had communicated to him.
Q. Is that all you told him?
A. I cannot remember the language.

By the Examiner:

Q. Do you mean that to take the place of the statement that you thought you forbade him to open the packages or boxes?
A. Well, when——
Q. Are you confining it to what you did this year?
A. When I used the word forbade I can't swear.
Q. I mean to tell him not to in any way; I don't care what words you used; by telling him not to open the boxes and in telling him to do anything you told him are two different things.
A. I don't recollect having told him lately not to open the boxes or bundles.
Q. At any time?
A. Yes; at the time I refer to.

By Mr. Stevenson:

Q. You then told him not to?
A. I then told him not to.
Q. Why did you tell him not to open these boxes or bundles?
A. Well, I wanted them left as they were so that when we did get to them they would be in the order in which I knew they were. That would be one reason; I don't know particularly my reasons.
Q. Did you tell him where to leave them, where to keep them?
A. No.
Q. Did you tell him what the contents of the packages or boxes were?
Mr. Flannagan. I object.

The Referee. Sustained; it all turns on the same question, the main question.

Mr. Stephenson. I didn't intend to ask him what he said.

The Referee. The objection is good; I sustain it.

Q. Mr. Burlingame, do you know what is in that box and those bundles?

Mr. Kenyon. I object.

The Referee. Sustained.

Mr. Stephenson. On what grounds?

Mr. Kenyon. That it tends to incriminate him.

Q. Are the books and documents called for by this subpœna served on Mr. Grant in that box or in those bundles?

Mr. Kenyon. I object.

The Referee. Sustained.

Q. Mr. Burlingame, you testified that you told Mr. Grant not to open this box shortly after they were delivered to him in September, 1911; did you know that this box was delivered to Mr. Grant?

A. I knew that a box was delivered to Mr. Grant.

Q. How did you know that?

A. I decline to answer that.

Q. On what grounds?

A. For the reason that the answer might form a link in a chain that would tend to incriminate me.

Mr. Stephenson. The witness has stated that he knew they were delivered, a box was delivered to him.

The Referee. He can answer what he was talking about when he said that.

Q. How do you know that a box was delivered to Mr. Grant?

A. I saw the box.

Q. Where did you see it?

Mr. Kenyon. I object; he is trying to find out the location of the box.

Q. Where did you see it?

Mr. Kenyon. I object.

The Referee. He has already answered that.

Mr. Stephenson. If it is part of his answer.

Q. Is that what you mean, that you saw it in Mr. Grant's office?

Mr. Kenyon. I object; he is giving a specific answer.

The Referee. Overruled.

A. I saw a box in Mr. Grant's office.

Q. Mr. Burlingame, you corrected certain of your testimony in regard to the number of shares which were issued, showing that you paid for three shares in cash and 99,997 were issued for principal?

A. No; 99,000.

Q. 99,997 were issued for property?

A. Yes, sir.

Q. How did you refresh your recollection so as to be able to be correct?

A. Well, you asked that question and I naturally fell into the error; it was an inadvertance entirely.

Q. Did you refresh your memory on it since you were here last time?

A. I thought the thing over; yes.

Q. And what was there that called back to your mind that you had paid for three shares in cash?

A. Well, I added 99,998 to three and I found it made 100,001 shares and it was *too* many——

Q. Why did you add it to three?

70 A. Because I had testified that each of the directors held a single share.

Q. I thought you testified that two of the directors held a share?

A. Well, at any rate it was in my mind, Mr. Stephenson, because it was a fact there were three shares for the three directors, one each.

Mr. Stephenson. I offer in evidence certified copy of the certificate of incorporation of The Ellsworth Company.

(Certificate marked "Government's Exhibit 2" of this date in evidence.)

I offer in evidence the by-laws of The Ellsworth Company.

(By-laws marked "Government's Exhibit 3" of this date in evidence.)

Q. Are these the by-laws of The Ellsworth Company, Mr. Burlingame?

A. I could not tell you.

Mr. Frankenau. We find that to be a copy. It has been compared in our office with the copy we have. It is introduced subject to any corrections.

Mr. Stephenson. Yes.

Q. You are, and if you are, how are you able to refresh your recollection to make that change of the date of the removal—do you refresh your recollection?

A. Well, I had the two years mixed, we were talking about 1900 about that time, and I fell into the error of using that date.

Q. Calling your attention to respondent's Exhibit D, being a certified copy of the bill of sale from The Ellsworth Company to The Ellsworth Corporation of New Jersey, looking at the items mentioned in the copy again can you refresh your memory as to whether or not those were practically all the furniture which belonged to The Ellsworth Company at that time?

A. I should say that it was practically all that belonged to The Ellsworth Company at that time, December 30, 1900.

71 Q. In looking at the part of this schedule where it says "Furniture in The Ellsworth Company's office at 40 Exchange Place and furniture in the Newark, Boston, and other offices"?

A. Yes.

Q. That was intended to include all furniture which is not specifically mentioned above, was it not, belonging to The Ellsworth Company?

A. I think so.

Q. So, after looking at that bill of sale can you say whether or not all the furniture belonging to The Ellsworth Company was transferred to The Ellsworth Corporation of New Jersey on the 30th of December, 1909?

A. I feel quite sure that that was the fact.

The Referee. The Ellsworth Company, did it have other property besides that?

The Witness. Yes, sir.

Q. And what other property did it have?

A. Referring now to December 30, 1910?

Q. 1909.

A. It had some cash and it had books of account, correspondence.

The Referee. Besides the things that are named in the subpoena, it had property and the furniture in addition to the things mentioned in the bill of sale and to the books and papers mentioned in the subpoena; it had other property, the Arizona Company?

The Witness. Well, it simply had some of this money I speak of in the bank.

Q. Just money in the bank?

A. Yes.

By the Referee:

Q. And what did you do with the money in the bank?

A. Spent it.

Q. Yourself?

A. Yes.

Q. It was in the name—the bank account in the name of the corporation?

72 A. I am not sure whether at that time the company had a bank account, but I am sure there was some money; I know there was.

Q. You don't know whether that was in the name of the company?

A. No.

Q. What happened to the title when the company was abandoned, is one of the questions.

Mr. Kinyon. He says he took it all over.

The Referee. If he took it over, took over other things and dealt with them at his own, it might have some bearing.

By Mr. Stephenson:

Q. Was this money, whether in the name of The Ellsworth Company or some other name, in some bank or was it in cash in a drawer or in pockets or something like that?

A. Mr. Stephenson, it is awful hard to divide money; I don't know.

By the Referee:

Q. Do you know how The Ellsworth Company was in the habit of paying its bills, whether while it was a going concern it had a bank account of its own?

A. Yes; I should say that up to some time in July or August or thereabouts, 1909, that it had its own bank account and all of its bills were paid out of that bank account.

Q. Did you have a right to draw checks on that account yourself?

A. Yes.

Q. Or the corporation?

A. Yes.

By Mr. Stevenson:

Q. What bank was that account in?

A. In the Carnegie.

Q. And in any banks?

A. I think we had accounts in savings banks, but I could not recall that.

Q. And then what happened after July or August, 1909, with reference to those bank accounts?

73 A. I think that the Carnegie bank account, which was the principal account, had grown so small that we withdrew—that we stopped the account. I am quite sure, although I am not positive.

Q. And you didn't open any other bank account?

A. I don't think so.

Q. That was in July and August?

A. Well, that was in the summer of 1909.

Q. So that on December 30 or 31, 1909, there was practically no cash went in the banks?

A. Well, there was some cash but I am quite sure that there was no bank account.

By the Referee:

Q. You said you paid some bills or paid the bills and also there were not very many the other day?

A. Yes.

Q. Do you remember how you paid those bills?

A. Well, they would not have been paid out of the company's money. I considered everything up to the 31st of December that the company had was the company's, after that date it was mine.

Q. Well, it was a one-man corporation so you did not take any particular care?

A. Yes.

Q. Besides cash was there anything in property that had belonged to The Ellsworth Company?

A. I think there were some claims that the company had.

Q. Any other tangible property?

A. That I considered valueless.

Q. Was there any other tangible property?
A. No.

By Mr. Sherman:

Q. Were there any claims that were valuable on that date?
A. I think not.

By the Referee:

Q. Then the only tangible property that was left after the delivery of this bill of sale was the record books and the letter files?
A. Yes.
Q. That is practically so?
A. Yes.

74 By Mr. Stephenson:

Q. Did you take possession of these books and letter files on or about December 31, 1909?
A. Well, do you mean——
Q. What did you do with respect to them; I don't want to use the word possession, which may give some legal meaning; what did you do with the books?
A. I took possession of the books.
Q. What did you do to take possession of them?
A. I told Mr. McIntyre and Mrs. Burlingame at the time they were signing over their stock that I was taking everything there was left.

By the Referee:

Q. Was anything done at that time physically with the books; was the physical situation with respect to the books changed, or did you just leave them where they were?
A. I don't think they were changed; I don't think I moved them out of the office.
Q. You didn't grab the books up and take them somewhere else?
A. I have already testified I retained the books for the purpose of—that there might be some claims made.
Q. That is, you testified you kept them in existence to have them for reference in the same place?
A. They were in what was then the office of The Ellsworth Corporation of New York; they were then there.

By Mr. Stephenson:

Q. And did they continue to stay there in the safe or wherever they were?
A. Well, until this time that I mention, some time in the summer of 1910.
Q. About what month was it in the summer of 1910 that they were removed from the office?
A. I could not tell you.

By the Referee:

Q. Was there any particular time when you considered the books ceased to belong to the corporation and did belong to you?

A. Yes.

Q. What was that particular time?

A. When I had announced, on the 31st of December, my determination to take them over, to take everything that was left.

Q. It was a mental action on your part?

A. A verbal——

Q. A statement to your associates?

A. Yes.

By Mr. Stephenson:

Q. About what month in the summer of 1910 was it that they were moved from the offices of The Ellsworth Corporation?

A. Well, I don't know.

Q. Do you know it was in July?

A. It was some time about July.

Q. Between December 31, 1909, and July, 1910, that these books were removed; did you do anything with respect to handling or removing the books?

A. Yes, sir.

Q. What did you do?

A. I turned them over to the American Trustee Company of New York. I think that was the title.

Q. About when was that?

A. Well, I can not remember the date of that.

Q. What did this turning over consist of?

A. Delivering the books to the corporation.

Q. What did you do to deliver them?

A. I talked to the president of that corporation.

Q. And who was that?

A. I talked to him; his name was Granger.

Q. Aurel C. Granger?

A. Yes.

Q. What did you tell him?

A. I told him that I wanted to turn over to his corporation for safe-keeping certain books and records that formerly had been used by The Ellsworth Company, which I had taken over as my property.

By the Referee:

Q. Was that prior to July, 1910?

A. Yes.

Q. And what was actually done with the books, physically?

A. I think there is a good place to stop.

Q. Why do you stop there?

Mr. Kenyon. I object.

The Referee. Allowed.

A. They were turned over to the American Trustee Company.
Q. How did you turn them over?
Mr. FRANKHAUSER. I make the same objection.
The REFEREE. Allowed.
A. I directed one of my employees to turn the books over to Mr. Granger, representing the American Trustee Company.
Q. Who did you direct?
A. Shall I answer that?
Mr. KNOWLTON. I object.
The REFEREE. Same ruling.
A. I think to Mr. M. A. Case.
Q. And what did you direct Mr. Case to do; did you say I turn over these books or what did you say?
A. In substance I said to Mr. Case, if it were he—and I think it was—that I had asked Mr. Granger as president of the American Trustee Company to take charge of the books formerly used by The Ellsworth Company, which books belonged to me, but wished placed in the Trustee Company's hands for safe-keeping.
Q. What did Mr. Case say?
A. He said all right, I will do it, or words to that effect.
Q. And what did he do?
A. I don't know.
Q. What did you tell him to do?
A. I just said——
Q. What did you mean by that, turn over?
The REFEREE. I will assume a physical delivery of the books to the other corporation.
The WITNESS. Exactly.
Q. Can you fix about when this was, before July, 1910; one, two, or three months?
A. Oh, no; it would be in the immediate neighborhood of that date.
Q. Shortly before July, 1910?
A. Yes.
Q. Shortly before the time they were removed?
A. Yes; shortly before the time, I suppose, they were removed.
Q. Was it a few days before?
A. I could not say that, because I don't know when they were removed.

By the REFEREE:

Q. Was this removal or transfer to the Trustee Company the transfer you had in mind when you place it in July, 1910?
A. Yes.
Q. That is the same removal?
A. Yes; when I say removal that is what I meant and what I was referring to; that is, the turning over to the Trustee Company for safe-keeping.

Q. Did they come back into your office after their removal to the Trustee Company and prior to July, 1910?

A. I should say not.

By Mr. STEPHENSON:

Q. Did you direct Mr. Granger or Mr. Case where to put these books, physically?

Mr. KEENER. I object.

The REFEREE. I think we will stop this examination with respect to the whereabouts of the books here.

Q. On page 24 you are asked, "Are you willing that Mr. Grant should open any box or packages that he has in his possession for the purpose of disclosing their contents to the Government? A. No; I have notified Mr. Grant not to open any box or bundles which he may have." Do you wish to change that?

A. No.

Q. Did you direct the making of this bill of sale, Respondent's Exhibit D, of the furniture of The Ellsworth Company to The Ellsworth Corporation of New Jersey?

A. Yes.

By the REFEREE:

78 Q. Was that bill of sale executed and delivered prior to or subsequent to the time you advised Mrs. Burlingame and Mr. McIntyre that the business of the company was to be closed and taken over by you?

A. Both. I had previously told them, and later the next day; the day following this on the 31st of December, the day following the bill of sale.

Q. Those things are dated December 31st and that is dated December 30th?

A. Yes.

Mr. KEENER. That was executed on the day it bears date.

The WITNESS. I didn't sign this.

The REFEREE. It appears to have been acknowledged on December 30th, 1909.

By Mr. STEPHENSON:

Q. At your last examination I think you said that you wished to keep these books as your own property for the purpose of having evidence if anyone should put in any claim against The Ellsworth Company; is that correct?

A. Well, in a general way to have them for reference.

Q. For refsrence?

A. I will not say that was the reason, but that might have been a reason.

Q. What was your reason for taking title, as you say you did, to those books at that time?

A. Because I wanted them.

Q. What did you want them for?

A. I have just given one of the reasons.

Q. And will you state that one again, please, so as to be definite?

A. In case there were any disputes regarding payments that might have made, we will say, to agents on commission account, for an example.

Q. You mean in case there was any disputes as to payments made by The Ellsworth Company?

A. Yes; but inasmuch as if a claim should be established
79 that could not be controverted I would have to pay it, I wanted the books so that I could establish the fact that the payments had been made.

Q. What was another reason for wanting title to those books?

A. I can't give a very good reason; I question whether——

Mr. FLANNAGAN. We would like to be allowed to say to the witness that he has a right to decline to answer if it would be necessary in order to make his answer, to divulge the contents of the books, and if the contents of the books would tend to incriminate him.

The WITNESS. That is the point I had in mind.

The REFEREE. That is for you to decide, if anybody, yourself.

The WITNESS. I think I ought to decline on that ground and I decline to give further reasons for that reason.

Q. If I understood you, Mr. Burlingame, then any other reason which you have for desiring title to the books would be one which divulged the contents of the books and so might incriminate you?

A. I can't go as far as that. On reflection I might think of other reasons.

Q. How long would you have to reflect about it?

A. Well, perhaps until the next hearing.

Q. Take the first reason that you wanted the title of those books for the purpose of refuting any claims which might be made against the company. Why wouldn't they be just as valuable for that purpose if the company retained the title as if you took the title?

Mr. KEENER. I object to that as argumentative.

Q. How did you reason, Mr. Burlingame, that you were any better off by having title to these books than allowing the title to remain in The Ellsworth Company?

A. My recollection of my reasoning at that time would be that if I took everything it would be mine and the company would no longer exist and we would not have to pay taxes or answer any questions.

80 Q. Well, then, the reasons you have previously given, namely, that you wanted the title to these books in order to have evidence in any claim that was presented against the company, was not the reason?

A. I have said already that it was a reason.

Q. A reason for what?

A. Of my wanting the books.

Q. Wanting title to them?

A. Well, I should say so.

Q. And you figured you were better off by having the title to the books rather than allowing the title to remain with The Ellsworth Company in meeting these claims?

A. I considered The Ellsworth Company as defunct.

Q. Did you consider you were better off by having the title of those books in your own rather than in the company's name, for the purpose of meeting any claims that might be brought against the company?

A. Yes.

Q. In what way?

A. Well, I am not a lawyer; I simply formed that conclusion.

The REFEREE. Isn't it true or is it true that when you closed out the business and when you stopped using The Ellsworth Company that you did not think anything about the question of legal title as distinguished from right and possession, but you just stopped doing that business and having stopped you kept possession or took possession and control of what there was left? Did you sit down and reason out whether you as president would transfer to yourself as an individual?

A. No; my general intuition was that I should keep them and they should be mine.

The REFEREE. Isn't it a question of law, pure and simple?

Mr. STEPHENSON. Yes. I have a witness from Boston and I would like to put him on now and withdraw this witness.

81 The REFEREE. Mr. Burlingame, you will please stand aside for the time being.

JAMES R. MCLEAN, being duly sworn and examined, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. Where do you reside?

A. Everett, Massachusetts.

Q. Have you an office in Boston, Massachusetts?

A. No; not of my own; I have headquarters.

Q. Where?

A. 36 Bromfield Street.

Q. And where were your headquarters in the summer and fall of 1911?

A. 29 Beacon Street.

Q. In the month of July, 1911, or August, did you see Mr. Burlingame in your office?

A. At 29 Beacon Street; yes, sir.

Q. Can you fix about when it was?

A. Not to be definite, only from the fact that we moved up in there—rather the parties who had the desk room moved up in there the latter part of July or the first of August. That is the only means I would have of knowing definitely.

Q. Some time in July or August?

A. Yes.

Q. Did Mr. Burlingame come to see you in the morning?

A. Yes; I should say so; in the forenoon.

Q. What did he say?

Mr. FLANNAGAN. I object, and I ask the right, preliminarily, to examine this witness as to his relations to Mr. Burlingame.

The REFEREE. You may.

By Mr. FLANNAGAN:

Q. At that time, Mr. McLean, did you have any relations with Mr. Burlingame?

Mr. STEPHENSON. I object to that as calling for a conclusion.

82 The REFEREE. You can cross-examine him on it, Mr. Stephenson.

The WITNESS. I don't know how to answer that; I haven't seen Mr. Burlingame for a long time prior to that morning he came in.

Q. Did you have explanation with him in respect of representing him in any way?

A. At that time?

Q. Yes.

A. No; not that I know of, in any way.

Q. Did anything occur at that time to make you represent him, or create you as his representative?

The REFEREE. Ask him what happened.

Mr. KERR. That calls for the conversation.

The REFEREE. All right.

Q. Did anything occur at that time to make you his representative?

A. I would say yes.

Mr. FLANNAGAN. I object to any conversation that may have occurred at this time in respect to anything that Mr. McLean was to do in reference to Mr. Grant for Mr. Burlingame, on the ground that in so far as it constituted him an agent is concerned, his agency to deal with Mr. Grant, and on the ground that Mr. Grant was Mr. Burlingame's counsel, and that whatever happened would be privileged.

The REFEREE. He can examine him fully on the question of whether or not he was his agent, unless it appears he was not his agent, and what occurred, and if it did or did not make him his representative.

By Mr. STEPHENSON:

Q. What occurred?

Mr. FLANNAGAN. I object to that question in so far as it may call for anything Mr. Burlingame may have called on Mr. McLean to do in connection with Mr. Grant, and I ask your honor to in-

83 struct him, in making his answer, not to state anything that Mr. Burlingame may have told him to do or say in regard to Mr. Grant.

The REFEREE. We are trying to find out whether you ever became the agent of Mr. Burlingame for the purpose of representing him or acting for him with Mr. Grant in any way; as to what he may have told you to do. If you were made his agent, you are not obliged to say. Do you understand that?

The WITNESS. I do.

The REFEREE. That is to say, against the objections of Mr. Grant and Mr. Burlingame you can not testify as to details of the agency.

The WITNESS. No.

Mr. FLANNAGAN. I further ask your honor to instruct this witness that if nothing occurred at that interview except such things you have already instructed him, that he is not to answer with respect to it. Then he can decline to answer the question altogether.

The REFEREE. Oh, no; because you have to establish he was the agent.

Mr. KREENER. We think we have, by the testimony of Mr. Burlingame and Mr. Grant.

The REFEREE. Anything that has to do with the subject of the agency you must not divulge; but upon the question of whether or not you were ever appointed the agent of Mr. Burlingame—you were ever requested by him or had authority from him in this matter—is a question that we want to know.

By Mr. STEPHENSON:

Q. Did Mr. Burlingame request you to consult Mr. Grant on his behalf at that first meeting?

Mr. KREENER. I object to that; we object to the word "consult."

The REFEREE. If he does not understand, he can say so.

84 The WITNESS. It is hard for me to distinguish.

The REFEREE. Do you understand the question?

The WITNESS. I do.

The REFEREE. Can you answer the question yes or no?

The WITNESS. The trouble is I can say yes.

Q. Do you understand that question?

A. I do understand it in my way; it may not be your way; I am trying to give a truthful answer to this, and if I was in a place where I could explain this with you and another representative open and between men I can explain satisfactorily.

Mr. FLANNAGAN. You are not in such a place.

The WITNESS. I am telling the truth, not assumed in this case; it is real.

The REFEREE. If you have any doubt as to whether the answer is yes or no could be misunderstood, you say so.

The WITNESS. I would say yes; still, you might have a different opinion.

Q. What do you mean by yes?

A. As I understand it.

Q. How do you understand it?

A. I would have to tell you from what was said and that and made me that to prove where I am.

By the REFEREE:

Q. Did he ever ask you on that interview to go and see Mr. Grant on his behalf—yes or no?

A. I could say yes, certainly, and I am just as plain on this as you are, as far as trying to do what is right. I will say yes, and you will object, and still we would both be right. What I mean by that is this—my position is a peculiar one. I have to determine by this gentleman, by my answer, something that will satisfy him.

Mr. STEPHENSON. You have to tell the truth.

The WITNESS. What I meant is, the meaning I have to harmonize with your ideas.

85 The REFEREE. We can't go into that. You are under oath, and if you can answer yes or no to the question, do so; and if you can, just say you can answer. We don't want to force an answer.

By the REFEREE:

Q. Well, you had interview with Mr. Burlingame?

A. Yes, sir.

Q. At that interview were you requested to see Mr. Grant on behalf of Mr. Burlingame as his representative?

A. My recollection, of course, is not as keen as the other man's would be.

Q. If you don't know, say you don't know; and if you do, say you do.

A. My recollection or the impression on me would be this, that what I did and what was said when he came back the second time, that there had been something asked of me to do. I was very busy at the time; I had a number of men around me, and, of course, I could not pay the attention to this; it hadn't the value to me; but he came back the second time and made a remark to me in relation to what he came there for, and the connection was what he said to me when he came back the second time would indicate to me he had asked me to do so.

Q. Did you ever, as a matter of fact, inform Mr. Grant as a representative of Mr. Burlingame?

A. I didn't see him at that time.

Q. At any time?

A. After that I went to Mr. Grant, as being my personal attorney and as Mr. Burlingame's attorney, and asked him to look after some matters that Mr. Burlingame has sent to me.

Q. Were you consulting Mr. Burlingame when you consulted Mr. Grant?

A. A matter came up in which I went to Mr. Grant and

86 referred to him the subject on the ground that Mr. Grant was the attorney for Mr. Burlingame and that he was also my personal attorney, and that therefore he was the man to determine my position of what to do in relation to the matter.

Q. Was it because of anything Mr. Burlingame said to you that you consulted Mr. Grant?

A. This was quite a time between the first time.

By Mr. STEPHENSON:

Q. At the first time Mr. Burlingame saw you in the morning of this day in August, 1911, did he then—mark my words carefully—did he then request you to see Mr. Grant?

Mr. FLANNAGAN. I object to it on the ground that the witness has already testified that from a subsequent transaction he understood that whatever communications were made to him at that time by Mr. Burlingame were for the purpose of communicating with Mr. Grant as his, Mr. Burlingame's attorney.

The REFEREE. Objection overruled.

Q. (Question repeated.)

A. Or to go to see him to confer with him.

Q. To go to see him?

A. To wait upon him; to go to his office?

Q. Yes.

A. The impression——

Q. Not the impression, but did he tell you to go to see him that first time?

A. As near as I can recall there was something evidently said.

By the REFEREE:

Q. Then you don't recall?

A. I don't recall, Mr. Referee, the exact language; I cannot recall that.

Q. How much time elapsed between the first and the second interview?

A. It was in the forenoon, might have been ten o'clock.

Q. And the other in the afternoon?

A. In the afternoon.

87 Q. Had you seen Mr. Grant in the meantime?

A. No.

Q. Did you see Mr. Grant after the second interview?

A. No.

Q. Did you ever see Mr. Grant as the representative of Mr. Burlingame?

A. I called upon at another period.

By Mr. STEPHENSON:

Q. At this first interview with Mr. Burlingame in the morning of August, 1911, did he request you to go and see Mr. Grant?

A. I replied to that, didn't I?

Q. What is your reply?

A. I say that I can't recall the language nor the fact that he asked me to go and see him except through what occurred subsequently. There wasn't time enough between the first interview and the second to allow me to follow out what was in my mind to do.

By the REFEREE:

Q. Did he at the second interview, in the afternoon, request you to call upon Mr. Grant? Can't you say yes or no about that; did he ask you at any time during that interview to call upon Mr. Grant?

A. My answer to that would be yes; that he told me that very thing was all right, and for me to do a certain thing.

Q. Was that certain thing with Mr. Grant?

A. Yes, sir; I say that happening had prevented me to see Mr. Grant.

Q. That made it unnecessary for you to see Mr. Grant?

A. Yes, sir.

By Mr. STEPHENSON:

Q. How long a conversation did you have with Mr. Burlingame that first time you saw him in the morning?

A. Not long. My recollection of it is—there were several people around there at the time when he came in. I hadn't seen him for a long time; it was quite a surprise to me; I didn't have any extended talk at all.

88 Q. Two or three parties were there when he talked with you?

A. Well, around in the office; I don't think we were alone, we may have been; there were several people around there, because there were other occupants of the office; he said finally he had some bundles or something like that—I mean that the conversation did not—was not extended at all, casual.

Mr. KRAMER. I ask to have that stricken from the record.

The REFEREE. No.

Mr. STEPHENSON. I can state that I would like to have this witness tell what occurred exception any confidential communications or questions which he was to ask Mr. Grant.

The REFEREE. Go on.

Q. Did Mr. Burlingame give you any questions at that first interview to ask Mr. Grant?

A. The recollection I have, sir, of what he said to me at that first interview is such that I can't recall definitely.

By the REFEREE:

Q. Then you answer is you don't recollect?

A. Only this way: I do know there was something that had happened from what occurred at the second interview that day that fitted into it and I could easily explain it if I were privileged to tell you.

Q. Does what occurred enable you to state whether or not Mr. Burlingame ever asked you ask any questions of Mr. Grant?

A. I should say that from what occurred there was possibly one question at least.

Q. That he had asked you to ask Mr. Grant?

A. Yes, sir.

Mr. Kinnan. Can we have the "bundle" proposition stricken out of the record—the phrase expunged from the record?

The Referee. Motion granted.

Mr. Stephenson. I take an exception to your honor's ruling.

By Mr. Stephenson:

Q. Did Mr. Burlingame say that this was confidential?

Mr. Flannagan. I object to it as immaterial.

The Referee. Allowed. I reserve my ruling on that until I can see cases submitted by each side that I may refer to.

Q. Did Mr. Burlingame say that this matter was confidential?

A. I wouldn't say, Mr. Stephenson, he said it was confidential; that is, using the word confidential, speaking as an ordinary business man would speak to another, such a case.

Q. He spoke to you as an ordinary business man?

A. I say the impression I would have as he and I talking in a general business way and he wanted me and I wanted him to do a certain thing.

Q. At this first interview in the morning did he give you any questions to consult Mr. Grant about?

A. Yes; that is exactly where I tried to answer the way you would like an answer; the very thing came up at the second interview——

The Referee. If you can't answer, say you can't answer.

The Witness. I could answer it the way that I have it brought to my mind would be allowed, but the objections prevent from doing it.

The Referee. You mean you shall not state the substance?

The Witness. Yes, sir.

Q. I didn't ask you what the question was.

A. Let me have it again.

The Referee. He simply asked you whether he asked you to consult with Mr. Grant.

Q. At that first interview?

The Referee. Can't you say so?

The Witness. The impression is that he did ask me to say something to Mr. Grant, due to what he said to me when he came back the second time; that is the only way I can recall it.

By the Referee:

Q. That is, do you say that you can state positively that he did give you or did not give you any questions to ask Mr. Grant?

A. I can state positively that my mind——

Q. Can't you say it without mixing it all up with words?

A. I don't know how to answer it.

Q. Yes or no, or I don't know?

A. I have the impression that there was something for me to ask him; the only way I can prove it to my own mind of what occurred at the second interview——

Q. Something happened at the second interview which led you to believe he told you something at the second interview to ask Mr. Grant?

A. Yes, sir; the impression I got.

Q. You never asked Mr. Grant?

A. No; it has passed.

Q. So if he did ask you to ask any questions of Mr. Grant on his behalf you never performed the request in reply?

A. Not in that particular instance.

By Mr. STEPHENSON:

Q. At the first time?

A. At the first time.

Q. What did he ask you at the first time?

Mr. KENNEDY. I object to that on the ground of the agency.

Mr. STEPHENSON. He was not at that time an agent.

The REFEREE. That does not bear on the question as to whether he was an agent or not. The fact he did not perform the agency.

The REFEREE. Now, you can for the time being at any rate tell us about the subject of the agency, if there was one.

91 Q. How long have you been in New York this last time?

A. I got here the night before last. No; yesterday morning. I left home midnight and got here yesterday morning.

Q. And you have previously testified fully about this, have you not?

A. I testified here.

Q. Before the grand jury some time ago?

A. Yes.

Q. And you have also talked with me about what occurred, have you not?

A. Yes; you have asked me some questions.

Q. When did you recall to your mind that Mr. Burlingame had given you a question to ask Mr. Grant?

A. Why, you asked me a question yesterday morning.

Q. And what did you tell me about any question that Mr. Burlingame gave you to ask Mr. Grant?

Mr. KENNEDY. I object.

The REFEREE. Sustained.

Q. When did you recollect that Mr. Burlingame might have put a question to you to ask Mr. Grant?

A. From what you said. I am not explaining anything only this, I was trying to get the connection. I think when he talked to me—I don't know when it came—afterwards——

Mr. KENNEDY. Yesterday?

The WITNESS. I should say so; the recollection from what I had tells me how it came to my mind.

Q. When did it come to your mind?

A. Yesterday.

Q. What time?

A. I can't recall; when you were talking to me.

Q. At that time it came to your mind that Mr. Burlingame had given you a question to ask Mr. Grant?

A. The purport came to me. I came across here yesterday morning without much sleep, I was up all night and I am not in much better condition to-day.

Q. When you were talking to me did it come to your mind
92 at that time that Mr. Burlingame had given you a question to ask Mr. Grant?

A. The suggestion came to me, and when I thought it over, it brought it to my mind.

Q. When did you ever think it over?

A. After I left you.

Q. Where did you go then?

A. I went back, I think, to the hotel; I am not positive.

Q. Who did you see there?

A. At the hotel?

Q. Yes.

A. My brother-in-law was the only person I saw at the hotel I knew, I think; I don't recall anybody else.

Q. Can you say now that you do recall then that first interview where Mr. Burlingame gave you a question to propound to Mr. Grant?

Mr. FLANNAGAN. I object.

Q. Did Mr. Burlingame ask you to be his agent?

Mr. FLANNAGAN. I object to that on the same ground, asking for a conversation, and he has stated what happened.

The REFEREE. Overruled.

A. Not in those words. He asked to do such a thing as I recall it.

Q. What did he ask you to do?

Mr. KERNER. I object to that so far as they relate to Mr. Grant.

The REFEREE. For the time being the objection is sustained; I will see what I think about the law.

Q. What did he ask you to do with reference to Mr. Grant?

Mr. KERNER. I object to that as immaterial.

The REFEREE. Sustained.

Q. What did Mr. Burlingame say to you with reference to any bundles or packages coming to your office?

Mr. KERNER. I object to that as immaterial.

The REFEREE. Sustained; so far as this particular inquiry
93 is concerned and you are limited to the question of what Mr. Grant shall be obliged to testify to.

Q. Did Mr. Burlingame ask you to get Mr. Grant's advice and communicate with him?

A. The subject——

Q. Did he or didn't he; I don't care what the advice was?

A. I was trying to answer you as nicely and decently as I know how.

Q. I don't care whether it is decent or not.

The Referee. Say so, yes or no; think it over carefully.

The Witness. The way I would understand it would be this, it all hinges on the two interviews.

Adjourned to Tuesday, April 30, 1912, at 10.30 a. m.

New York, *April 30, 1912.*

Met pursuant to adjournment.

Present: The Referee, Judge Keener, Mr. Flannagan, Mr. Stephenson.

James R. McLean resumed the stand and direct examination continued.

By Mr. Stephenson:

Q. Mr. McLean, in this afternoon on that first day when you saw Mr. Burlingame in the morning in August, 1911, did he tell you you need not do what he had told you in the morning?

Judge Keener. I do not see the relevancy of that, your honor.

The Referee. I will allow that.

A. To the best of my recollection, yes.

Q. After he told you that, what did he say?

Judge Keener. I object to that—after he told him that, what did he say. That answer may call for a complete disclosure of all that took place between Mr. Burlingame and this witness.

The Referee. I will overrule that objection.

Judge Keener. Now, can we have a preliminary examina-
95 tion on that before the question is answered?

Mr. Stephenson. I object to that.

The Referee. That question cannot do any harm. While the Government cannot locate or ask any question that would locate the books that are privileged, nevertheless if they could be located in a place where they would not be privileged they would have a right to do that, and if they were located in a place where they are privileged you are perfectly protected.

Judge Keener. Although it relates to the agency on the part of Mr. McLean?

Mr. Stephenson. But he told him not to do it, and now, if after that he comes back and volunteers something——

Judge Keener. But that don't terminate the agency—it may or may not terminate the agency. That is what I want to find out, whether it did or not terminate the agency.

The Referee. I will allow the question as put.

Q. (Question read.)

A. Simply to send the packages to Mr. Grant's office.

Mr. Flannagan. Now, we move to strike that out.

Judge Keener. I will move to expunge that from the record.

(Motion granted. Exception to Mr. Stephenson.)

Q. Now, Mr. McLean, at this second interview on the afternoon of that same day, did Mr. Burlingame request you to take any questions to Mr. Grant for the purpose of getting legal advice on them? Don't say what they were, but did he request you to take any questions to Mr. Grant for the purpose of getting legal advice on them?

A. Not to my recollection, at the second interview.

Q. Now, at this second interview, did Mr. Burlingame say that he had seen Mr. Grant between the first interview and the second interview?

Judge KREKEL. I object to that.

(Objection overruled.)

A. I am not clear just what he said—I think——

Judge KREKEL. Don't think.

The REFEREE. You have got to say whether he did or not, or that you don't know. You either know or don't know, or you cannot remember.

The WITNESS. I think——

Judge KREKEL. I object to his thinking.

Q. Give your best recollection.

A. Then, to the best of my recollection, I believe he said that he had seen him——

Judge KREKEL. I move to strike that out; that don't mean anything, "to the best of my recollection, I believe he said."

(Motion denied.)

Q. Now, did he tell you whether he had any conversation with Mr. Grant?

A. I do not recollect that, Mr. Stephenson.

97-98-99 Q. Did he tell you where he had seen him?

A. No; not to my recollection, sir.

Q. Did he tell you he had made any arrangement with Mr. Grant?

Judge KREKEL. I object to that, "Made any arrangement with Mr. Grant." He may have arranged to dine with him.

Q. Did Mr. Burlingame tell you to which office to send these books, these packages?

Judge KREKEL. I object to that.

The REFEREE. That is immaterial.

Q. Did Mr. Burlingame tell you not to take the questions to Mr. Grant which he had given you in the morning to take to him?

Judge KREKEL. I object to that.

The REFEREE. I believe he has already answered that.

Mr. STEPHENSON. Yes; I guess he has.

Q. Mr. McLean, did you send those bundles and box down to Mr. Grant's office?

Judge KREKEL. I object to that.

(Objection sustained.)

Q. Did Mr. Burlingame say that these boxes or bundles contained or were any part of a confidential communication to his attorney, Mr. Grant?

100 Judge Knowlton. I object to that as a statement to his agent of the contents of the bundles. I object to it as immaterial.

Q. Did Mr. Burlingame state the purpose for which any packages or bundles were to be sent to Mr. Grant?

A. My recollection is no.

Q. He did not?

A. Not at that time.

Q. Did he at a subsequent time?

A. No; because I did not see him after that, as I recall.

Q. Did Mr. Burlingame ask you to report to him any dealings that you had with Mr. Grant or any information or advice you got from him in respect to this transaction?

Mr. Flanagan. This is the second conversation?

Mr. Stephenson. Yes.

Judge Knowlton. I object to that.

The Referee. He stated he asked him not to. He stated that he see him.

Q. Now when, after that day, was the next time you saw Mr. Burlingame?

A. I do not know just the date, Mr. Stephenson.

Q. Well, about when?

A. Well, some few weeks afterwards, but I cannot remember the date.

Q. Two or three weeks after?

A. Well, a few weeks, I couldn't just tell now and place the time.

Q. Where was that?

A. The same place, 2A Beacon Street.

Q. Was Mr. Burlingame alone at that time?

101 A. To the best of my recollection, he was.

Q. And did he come there in the morning?

A. I should say so; yes; in the forenoon.

Q. And was anyone else in your office when he was there?

A. Yes; there was, when he was there; I do not know just the time when he came in that there was any one there.

Q. Just the time he came in?

A. Yes.

Q. But while he was there talking to you were there other people at the office?

A. In and out.

Q. And while he was talking to you, did the other people that were in there also talk to you?

A. Why, it was a general conversation at the time. I introduced him to two or three people, as I recall it.

Q. Was there anything secret in the conversation between you and him at the time?

Judge Knowlton. I object to that as calling for the witness' opinion.

Q. Did Mr. Burlingame whisper to you in the conversation he had at that time?

Judge KEENER. I object to that. It is immaterial.

(Objection overruled.)

A. I do not recall anything of that time.

Q. Did you whisper to him?

A. I do not think so.

Q. That is, did he talk to you and you to him in an ordinary tone of voice, such as we are talking to each other now?

102 A. Why, at times; yes; I cannot just remember now the way the conversation went on—how it went on. I wish I could whisper myself, because the character of my office was such at that time that people on the other side could hear it.

Q. And was your office such as people coming in and out of there could hear the conversation going on with Mr. Burlingame?

A. Possibly.

By Judge KEENER:

Q. Depending on the tone of voice?

A. Yes; entirely.

Q. And depending on the person, some speaking louder than others?

A. Yes.

Q. And depending on the tone of voice and the hearing of the person?

A. Yes.

By Mr. STEPHENSON:

Q. Now, at this second time, did Mr. Burlingame ask you to see Mr. Grant?

A. I have no recollection of it.

Q. Did he ask you to communicate with him?

Mr. FLANNAGAN. I object to this.

The REFEREE. He has already answered the question.

Mr. STEPHENSON. This is the second interview.

The REFEREE. Yes; and he has answered as to that.

Q. Now, the third interview. On the first day there were two interviews, one in the morning and one in the afternoon?

A. That is the very first time, you mean?

103 Q. Yes.

A. Yes.

Q. Now, we will call those one and two. Now, then, comes the one we will call the third; it was about three weeks afterwards I think you testified to? I am not sure about the weeks; you have the records better than I have; it was several weeks after.

Q. Now, at this third interview—that is, the one several weeks after we were talking about—did Mr. Burlingame ask you to communicate with Mr. Grant?

A. I have no recollection of it.

Q. Was Mr. Burlingame there in the afternoon, too?

A. I think he was.

The REFEREE. On this third interview, several weeks after the first interview?

The WITNESS. Yes.

Q. That third interview?

A. Try not to get me mixed up; I can only distinguish them as between the first and second lots.

Q. Well, we will call it the second lot so as to keep you clear.

A. Yes.

Judge KEENER. The second lot being the third interview?

The WITNESS. Yes.

Q. Do you know the purpose for which any box or packages were delivered to Mr. Grant, if they were delivered to Mr. Grant by Mr. Burlingame?

A. When? At any particular time?

104 Q. At the very first day, on the second lot; either the first lot or second lot. Now, subsequent to the second interview, and I mean by the second interview the interview on that first day, did Mr. Burlingame tell you the purpose for which these packages were to be sent to Mr. Grant—if they were to be sent—did he tell you the purpose?

A. Of the first lot, do you refer to?

Q. Of the first lot?

A. He did not tell me at the third interview why he sent—why the first lot was sent.

Q. Did he tell you at the time? (Not answered.)

The REFEREE. At any time after the second interview?

The WITNESS. No; my recollection of that, sir, is that——

The REFEREE. Your best recollection I want.

The WITNESS. The best recollection I have of what he said to me was the first interview on the first day.

The REFEREE. Anything subsequent to that?

The WITNESS. I do not recall particularly that he confirmed anything further as to what he said at that first interview of what he wanted.

The REFEREE. And that was in the light of the second interview that you considered there was something that you did as his representative?

The WITNESS. Exactly.

Q. Was Mr. Burlingame there that evening also?

105 Judge KEENER. What evening?

Q. The evening of the third interview?

A. I do not know how long he stayed. I went home usually about five or half past five.

Q. And he was there when you left?

A. Yes.

Q. And did you see him the next day?

A. Yes.

Q. In the same place?

A. Yes.

Q. And the day after that?

A. No; I do not think so.

Q. Now, when was the next time you saw him?

A. Oh, it was a number of weeks afterwards; I can not fix just the date.

Q. A number of weeks afterwards?

A. Yes; I should say a number of weeks afterwards.

Q. And at the same place?

A. Yes.

Q. What did he say then?

Mr. FLANNAGAN. I object to that except in so far as he may have said something on the subject of whether or not Mr. Grant was his attorney.

The REFEREE. Or on the subject of in what capacity or how Mr. Grant had possession of whatever boxes he may have had possession of—packages or boxes. He can testify to any thing that Mr. Burlingame told him subsequent to the second interview; that is, anything he did on the question of how Mr. Grant holds any books or papers that he may hold.

Q. Now, Mr. McLean, when was the last time you saw Mr.
106 Burlingame?

A. You ask me that question again, now? Are you repeating the same question?

Q. No; the next time after this?

A. I will distinguish that, Mr. Stephenson, by saying the third lot. Those two interviews were the first lot, and the second lot, and then the third lot that didn't come to me at all. That lot the papers didn't come to my possession at all.

The REFEREE. I thought when you said lot you were talking about interviews.

The WITNESS. No; I mean whatever packages Mr. Stephenson spoke of.

Judge KEENER. I move to strike that out.

Q. Let us substitute for the word "lot" the word "period."

Judge KEENER. Now, you are talking about the fourth time he saw him.

Q. Now, the third period, I think you said you saw him. Now, the fourth period, how long after that was that?

A. I can not remember the time; it was a number of weeks; I couldn't fix the time.

Q. Now, during this period, did you receive any communications from Mr. Burlingame?

A. Do you mean prior to seeing him this last time?

Q. Yes.

A. Yes.

Q. How many times?

A. I do not recollect more than one.

107 Q. That was a letter, was it?

A. Yes.

Q. And what did you do with that letter?

A. I gave that to Mr. Grant.
Q. You gave that to Mr. Grant?
A. Yes.
Q. Was that letter addressed to you?
A. Yes, sir.
Q. Did Mr. Burlingame tell you to give that letter to Mr. Grant?
A. I can not recollect the exact language, Mr. Stephenson, but the contents led me to take that to Mr. Grant.
Q. But was there anything in the letter that told you to take the letter itself to Mr. Grant?
A. Oh, I do not know; I do not recall that.
The REFEREE. Why did you take the letter to Mr. Grant?
The WITNESS. Mr. Grant is my counsel.
The REFEREE. You took it to Mr. Grant as your personal counsel, then?
The WITNESS. Yes; and also as Mr. Burlingame's counsel.
Q. Well, what led you to do that?
A. In that letter he said——
Judge KEENER. I object to that.
Q. What did the letter say?
Mr. FLANNAGAN. I object to that.
Q. Did the letter mention Mr. Grant's name?
A. I couldn't swear to that, Mr. Stephenson.
Q. What is your best recollection?
108 A. To the best of my recollection, I think Mr. Grant's name was mentioned, but I can not recall how.
The REFEREE. Well, did the letter call for any action on your part with Mr. Grant?
The WITNESS. Why, I felt so, Mr. Referee, when I took it to him, within, I should say, two hours from the time I received it; I know it was within a short time.
Q. You saw Mr. Grant, you mean, within two hours after you received it?
A. I should say approximately that, Mr. Stephenson. I know the letter came in the regular morning mail from New York, and I took it down that forenoon.
The REFEREE. In the interest of Mr. Burlingame?
The WITNESS. Certainly, sir.
Q. And did you give anything else to Mr. Grant in addition to that letter?
Judge KEENER. I object to that, if you honor please.
Q. Did Mr. Burlingame give you any other instructions other than those included in that letter?
Judge KEENER. I object to that.
The REFEREE. He don't say that the letter contained instructions, but he said the letter was such that he felt he ought to take it to Mr. Grant, and that Mr. Grant was Mr. Burlingame's lawyer as well as his lawyer, and that he was acting in the interest of Mr. Burlingame when he took the letter to him.

109 Q. When you did see Mr. Grant and handed him that letter were you consulting him regarding your own affairs?

A. I was consulting him both as to myself, Mr. Stephenson, and Mr. Burlingame, absolutely.

Q. You mean—did you have two separate interviews with him, one regarding your own affairs and one regarding Mr. Burlingame's affairs?

The REFEREE. You are willing to swear, are you, positively, that you were consulting him in the interest of Mr. Burlingame?

The WITNESS. I absolutely—I am going to say that personally I saw him, went to him as Mr. Burlingame's attorney, and as my attorney, and I used those words to him.

The REFEREE. And from the subject of the letter did you consider that it required you to see Mr. Grant in the interest of Mr. Burlingame?

The WITNESS. Absolutely.

Q. Now, Mr. McLean, you needn't answer this question unless you desire to, but what was your own business that you were consulting Mr. Grant about at that time?

Judge KRENER. Mr. McLean is not under the necessity of answering that question.

Mr. STEPHENSON. I told him so. You can answer that if you desire, and you need not if you do not desire.

110 The WITNESS. Mr. Grant and I had been very close to each other, and I had known him for many years, and I honored and respected him, and in every sense that I speak of *the* there isn't a word between us that I would say was privileged, but I said to him, naturally——

Q. Then, what was it you said to Mr. Grant?

A. I don't want to tell that, Mr. Referee. I have had matters——

The REFEREE. You needn't explain the nature of that.

The WITNESS. I don't care to have to make a statement about that, but there are good and valid reasons why I——

Q. How long a time did you consult Mr. Grant at that time?

A. Not but a short time.

Q. Did you go into his own private office?

A. Yes.

Q. Was anyone else there?

A. Not a soul.

Q. Were you there with him more than five minutes?

A. Possibly I may have been ten minutes.

Q. And what proportion of that time did you consult with him regarding your own affairs?

Judge KRENER. I object to that as immaterial.

Q. Did you consult Mr. Grant as regards your own affairs first, or in regard to Mr. Burlingame's affairs?

A. I can not recall just that, Mr. Stephenson. I know when I went in I told him that I——

Judge KRENER. Now, one moment.

111 The WITNESS. I am not telling, Judge Keener.

Judge KEENER. Well, you will open the door, and then you will tell.

The WITNESS. I do not recall that I spoke of his first, but I distinctly remember what I am telling you now.

Q. You do remember that a distinct part of the interview was regarding your own affairs?

A. I spoke to him of my own affairs.

Q. And another distinct part regarding Mr. Burlingame's affairs?

A. Yes; part of it was distinct.

Q. Did Mr. Burlingame give you any other directions in addition to those contained in this letter which you have referred to?

A. Does that question refer to that particular lot, shipment, Mr. Referee? I did not see Mr. Burlingame after the letter was received, and therefore I could not receive any other instructions, and consequently could not get any other directions.

Q. Now, did this letter request you to get any legal advice from Mr. Grant and communicate it to Mr. Burlingame?

A. I do not recall anything of that kind—to communicate anything to him.

Q. Well, did it request you to propound any questions or question to Mr. Grant?

A. I do not recall that.

Recess until 1.45 p. m.

112 After recess.

Q. Now, Mr. McLean, coming back again to your first day in August, when you met Mr. Burlingame, was the question which Mr. Burlingame gave you to put to Mr. Grant, the question as to whether Mr. Grant would receive any packages or bundles, or a question, in substance, to that effect?

Judge KEENER. I object to that as immaterial, and that it calls for a communication between a client and his attorney.

(Objection sustained. Exception to Mr. Stephenson.)

Q. Now, Mr. McLean, at that first interview in August with Mr. Burlingame, in the morning, how large an office was it in which Mr. Burlingame consulted you that morning?

A. Oh, I should say 10 feet wide——

Q. About as wide as this office?

A. No; it is about as long as it would be crossways.

The REFEREE. That don't mean anything to the stenographer. Try and give the figures.

The WITNESS. I was trying to get the length, Mr. Referee; about 16 or 18 feet; isn't that correct, Mr. Referee?

The REFEREE. No; I think not.

Q. Well, about 16 feet?

A. Anywhere from 14 to 16 feet.

Q. And about how wide?

A. I should say, maybe, 10 feet wide.

Q. And was there more than one desk in that room?

A. Yes.

113 Q. How many?

A. Well, there was only one desk occupied; there was a typewriting desk and another unoccupied table.

Q. Now, were you sitting at one of the desks when you talked to Mr. Burlingame?

A. I think so.

The REFEREE. Was that whole office in one room?

The WITNESS. No; the lobby comes in just the same as this there, outside there——

Judge KEENER. Why can't we say there was a lobby in connection with that office?

The WITNESS. There was a lobby and two offices.

Judge KEENER. And you describe one as the inner office where you sat?

The WITNESS. Yes.

Q. And your talk with Mr. Burlingame took place in this inner office?

A. Yes.

Q. And what part of that inner office were these other people in that you speak of that were there during this conversation?

A. Well, they were not present all the time while we were talking. As I have said before, I can recollect distinctly different people were coming in and going out, different deals I had on at the time, but they were present in the inner office only during part of the time that we were talking.

Q. Did Mr. Burlingame talk to you while any of them were in the office?

A. Yes.

114 Q. And did he talk to you when some of them were out of the office?

A. Certainly.

Q. Now, this question that he gave you to take to Mr. Grant, was that given to you when you were alone and others were out of the office, or when the others were in there?

A. When we were alone.

Q. How can you place that?

A. Why, from the fact that what he wanted, or indicated to me, at least, he wouldn't talk about before other people.

The REFEREE. That is argumentative.

The WITNESS. Well, I mean because that is the impression I have in my mind on the subject.

The REFEREE. That is argumentative; it isn't a fact.

Judge KEENER. Well, the witness was asked why he said that, therefore, that is responsive to the question.

The WITNESS. Well, I fix that—I will swear to this, because he asked me that while we were alone, and I fix that by a certain fact. Mr. Stephenson asked me——

The REFEREE. You say that you think that by reason of the fact that he wouldn't have done it in the presence of any other people?

The WITNESS. Yes.

The REFEREE. And that is the only reason?

The WITNESS. No; it is fixed plainly in my mind that he
115 asked me that when we were alone.

Q. What is the circumstance that fixes that in your memory as occurring when you were alone?

A. Why the question that he wanted—the information that he wanted me to convey to his attorney.

Q. Did you send the other people out to enable him to ask you that question?

A. Oh, no.

Q. Did he tell you that he wouldn't ask you until they were out?

A. No; there was no necessity for that, sir.

Q. And I think you said that was the only question; is that correct?

A. Which is that?

Q. One question that he asked you to ask Mr. Grant?

A. One question that he wanted to learn from Mr. Grant.

Q. One question that he wanted to learn from Mr. Grant?

A. Yes.

Q. Now, did Mr. Burlingame request you to go and see Mr. Grant in his office, or to call him on the telephone, or did he direct you to write him, or in any way communicate with him?

Judge KEENER. I object to that as immaterial.

Mr. STEPHENSON. The method of doing it, without saying what it was, may have a bearing.

The REFEREE. For what purpose do you want that?

Mr. STEPHENSON. Bearing on the question of whether it was a confidential communication, and the method in which it was
116 given, the circumstances, of course, vary in every individual case.

The REFEREE. Well, all right, go ahead, I will allow it.

The WITNESS. My recollection is that he asked me to go.

Q. To go and see him?

A. In person.

Q. At his office?

A. Well, yes.

Q. And did he tell you to go that day?

A. I do not know as he specified particularly, and yet I think he did.

Q. And did he tell you what time of day to go?

A. Not particularly as to the hour; no.

Q. Why didn't you go?

A. Well, I had matters of my own to attend to, Mr. Stephenson. There wasn't much time lost, as you can readily find out, between the time I was asked and the time it occurred.

Q. When Mr. Burlingame saw you in the afternoon, was the first thing he said to you, substantially, that you needn't do what he told you to do in the morning?

A. Practically that; yes.

Q. And what did you say?

A. I had nothing to say, Mr. Stephenson.

Q. Did you say all right or assent to it?

A. I haven't any idea as to that, because there wasn't any reply to it; it may have been all right, or it may have been anything.

Q. But you didn't do what he told you afterwards?

A. I did not see Mr. Grant.

117 Q. And that was because Mr. Burlingame told you not to do it, is that correct, in the afternoon?

A. I do not know as he told me not to do it, but a thing occurred which made unnecessary that which he asked me to do.

Q. He told you that, did he?

A. No; he didn't tell me that.

Q. How did you know such a thing occurred?

A. They wouldn't allow me to answer here as to what I did at that second interview, and what I did at that second interview, and what he said, didn't call for me to see Mr. Grant.

Q. Now, what else did Mr. Burlingame tell you at that second interview?

Judge KEENER. I shall have to object to that. Confine yourself to something about Mr. Grant, or some such conversation.

Q. What did Mr. Burlingame tell you in regard to any bundles or packages?

Judge KEENER. Relating to Grant?

Q. (Continued.) Any bundles or packages relating to Mr. Grant?

Judge KEENER. Now, I object, if your honor please.

Q. What did Mr. Burlingame tell you with reference to any packages or bundles or any box which had been delivered to Mr. Grant?

Judge KEENER. Same objection.

118 The REFEREE. Did Mr. Burlingame say anything to you that would in any way bear on the question of the purpose for which any package or box coming from Mr. Burlingame had been sent to Mr. Grant's office? Did he say anything that would indicate in what capacity Mr. Grant held any box or packages that he might have held?

The WITNESS. Mr. Referee, at that time he didn't hold those packages, but he did indicate at the first interview what he wanted Mr. Grant to have them for.

The REFEREE. He did indicate to you what he wanted him to have them for?

The WITNESS. Yes; these packages were in my place at the time of the second interview, and had not been delivered to anybody. At

the first interview these packages were there and had not been delivered to anybody, and when he came to me at the second time, then——

Q. Now, what did Mr. Burlingame say?

Mr. FLANNAGAN. About his purpose?

Q. Did Mr. Burlingame say anything with reference to the delivery of this box to Grant; did he say anything upon that subject; did he say anything with reference to the delivery of the package to Mr. Grant?

Mr. FLANNAGAN. I object to that.

Q. What did he say that indicated this purpose—what did
119 he say at this second interview about this purpose?

A. Mr. Stephenson, it was at the first interview that he indicated what the purpose was, not the second interview.

Q. What did he say at the first interview?

A. That is what I was shut off about before.

The REFEREE. You may answer that now. What did he say at that first interview which indicated the purpose for which he desired to have the packages and box, if he did so desire, to have them deposited with Mr. Grant or put in Mr. Grant's office?

The WITNESS. That he wanted me to see Mr. Grant, as I recall it, that he had to go back to New York hurridly, and I think he mentioned on a certain train. I know he wanted to get back that day, and I think he inquired if I knew whether Mr. Grant was in town or not, and I did not, and that if he didn't get to Mr. Grant, that he wanted me to see him in relation to these bundles that were coming in there.

The REFEREE. That is what he told you, perhaps, but that don't tell us what indicated the purpose for which he wanted the books or papers sent to him.

Q. Was there anything else which indicated the purpose?

A. Certainly.

The REFEREE. Now, tell us what that was.

The WITNESS. He wanted to know whether Mr. Grant would receive them or not.

120 Q. Is that all he said?

A. That was the subject of it.

Q. Is that the substance of what he said?

The REFEREE. What was it that indicated the purpose he wanted them received by Mr. Grant; what was the reason for that?

The WITNESS. He said they were private papers, and he said he wanted to know that they were taken, or given, to Mr. Grant, and he wanted to know whether I would see Mr. Grant, and see that he would receive them for him.

The REFEREE. For what purpose?

The WITNESS. As his attorney.

Q. Did he say that?

A. I do not know that he said as his attorney, but he said Mr. Grant—he spoke about him as being his attorney anyway.

Q. Well, he said he wanted Mr. Grant to get them. What else did he say?

A. Now, that was about the substance of it, Mr. Stephenson.

The REFEREE. Was there nothing else which indicated to you from what Mr. Burlingame said as to the reason why he wanted Mr. Grant to receive the box—indicating why it was to be taken to him, and why he wanted him to receive it?

The WITNESS. No; he merely said he wanted them to be taken care of, and in the event that Mr. Grant was not there, to determine what was to be done with them, he asked me whether I would take
121 care of them, whether I would see that they were taken to him, and if Mr. Grant was not there to see where I could reach him.

The REFEREE. That doesn't indicate yet a very good reason why they should go into Mr. Grant's office?

The WITNESS. Well, that was the object of Mr. Burlingame, Mr. Referee.

The REFEREE. That is what I want to find out, what he told you about it.

Q. He didn't say anything about what his purpose at that time was?

A. As I recall, he wanted to have Mr. Grant have them as his attorney.

Q. Did he say that?

A. That is my best recollection; that he wanted Mr. Grant to have them.

Q. Can you recall whether he used the word "attorney" or not?

A. I should say, to the best of my knowledge, yes; to the best of my recollection.

The REFEREE. He didn't say anything that led you—that would indicate to you that they were there simply as a place to keep them in, or in order that you might have a talk with Mr. Grant about them later, so as to have the books present at the interview, or simply have them there for safe-keeping? Of course, it isn't necessary that he should have said any such thing to you, but if he did tell you anything of that kind that would enable you to answer that ques-
122 tion, tell us what it was.

The WITNESS. To the best of my recollection all that he said was that he wanted Mr. Grant to have those papers to go over them.

Q. Do you remember that?

A. Well, yes; it was to the effect that they were private papers and personal papers, and he wanted Mr. Grant to have them; that is the best of my recollection.

The REFEREE. Are you positive that he said anything that would indicate that he wanted Mr. Grant to go over them rather than keep them?

The WITNESS. Well, I took it this way, that they were his papers, personal papers, and that Mr. Grant was to have them as his attorney.

Q. That is the meaning you got?

A. Yes; that is the meaning I got; whether he was to store them, of course I do not know.

The REFEREE. Did he tell you he was going to go over them with Mr. Grant himself?

The WITNESS. I do not recall that.

Q. Well, can you recall distinctly whether or not he said that Mr. Grant was his attorney at that time; can you recall that?

A. I would say unhesitatingly, yes, Mr. Stephenson, because our relations with Mr. Grant were of such a character that I should say yes.

123 Q. Now, at this second interview, what did Mr. Burlingame say in the afternoon?

Mr. FLANNAGAN. We asked that that be limited.

The REFEREE. I will limit it in the same way.

Q. What did he say to you at the second interview regarding Mr. Grant and regarding the books?

A. He asked me or desired me to tell him, or ordered me, anything you please, to send these books to Mr. Grant.

The REFEREE. For what purpose; did he say for what purpose?

The WITNESS. Not at that particular time, because he spoke to me earlier about that.

The REFEREE. Well, did he say anything at any time subsequently that had to do with the purpose of the sending of them there?

The WITNESS. No; I do not recall specifically anything that he said that afternoon.

Q. Or at any time subsequently. Do you know anything more about it? Did he say anything more than telling you he wanted Mr. Grant to have the books, or did he tell you anything that would tend to show or indicate as to why he wanted Mr. Grant to have these things?

A. He told me about it the first thing.

The REFEREE. Yes; but did he say anything at the second interview or at any other interview about it?

124 The WITNESS. I do not know anything specifically on that point. At the second interview he came in and went out a short time afterwards, because he wanted to take an early train and had to leave for New York.

Q. Well, then, did you send those to Mr. Grant?

Mr. FLANNAGAN. We object to that.

(Objection sustained.)

Q. Did he tell you how to send them to Mr. Grant's office?

Judge KERNER. I object to that as immaterial.

(Objection overruled.)

A. No, sir.

Q. Did he pay you anything for the expense of sending them?

Judge KERNER. I object to that as immaterial.

The REFEREE. I do not see that is very material, is it?

Mr. STEPHENSON. No; I do not know that it is very material.

Q. Did you send these packages to Mr. Grant's office?

Judge KEENER. I object to that; that is the same question that was asked before. I object to it, in the first place on the ground that it involves his asking the agent of the client to disclose matters with reference to which he was representing the client, and also furthermore, it is immaterial.

The REFEREE. Objection sustained until it is proven that they were simply deposited with him.

125 (Exception to Mr. Stephenson.)

Q. Now, Mr. McLean, what did Mr. Burlingame tell you at this first interview?

Mr. FLANNAGAN. We object to that as already answered, and particularly unless it is limited——

The REFEREE. I think you have that already.

Q. Have you stated all that Mr. Burlingame told you at the first interview?

Mr. FLANNAGAN. We object to that unless it is limited.

Mr. STEPHENSON. On what ground is the objection made?

Mr. FLANNAGAN. We object on the ground that it is immaterial unless it is limited to what I previously stated, to wit, the relation of Mr. Grant and Mr. Burlingame and the capacity in which Mr. Grant was to receive these books.

(Objection sustained. Exception to Mr. Stephenson.)

Judge KEENER. I want to note further the objection that it calls for a communication by Mr. Burlingame's agent—calls for a statement by the witness of a communication made by Mr. Burlingame to the witness as his agent in connection with his attorney, Mr. Grant.

Q. At this first interview did Mr. Burlingame say anything to you with reference to any bundles?

Judge KEENER. I object to it in that form.

(Question withdrawn.)

126 Q. What did Mr. Burlingame say to you with reference to any bundles or packages, and also with reference to Mr. Grant?

Judge KEENER. I shall object to that as too extensive.

The REFEREE. You object to the words "and also"?

Judge KEENER. Yes; "and also Mr. Grant."

Q. What did Mr. Burlingame say to you with reference to these bundles or packages and Mr. Grant's connection therewith?

Judge KEENER. Now, if your honor please, I do not like to appear here as raising captious objections, but it seems to me the question should be in this form: What did Mr. Burlingame say as to Grant's connection with the bundles or boxes?

The REFEREE. I will allow him to answer the question.

Q. (Question read.)

Judge KEENER. Now, I ask the referee to instruct the witness that he shall only answer as to Mr. Grant's connection with these bundles or boxes.

Mr. STEPHENSON. I object to that instruction being given and ask that the question be answered as it is put.

Q. What did Mr. Burlingame say to you with respect to Mr. Grant's connection with any bundles and packages—your best recollection?

A. The packages, of course——

Judge KREKEL. No; pardon me.

Q. What Mr. Burlingame said?

A. Well, I want to understand this.

127 The REFEREE. He is asking you what Mr. Burlingame said to you. You certainly remember or you don't remember. If you do remember what he said tell us what it was, and if you don't remember say so.

The WITNESS. I do remember that he referred to these packages which were coming and spoke of Mr. Grant; that he wanted Mr. Grant to have these packages, and I think he inquired if I knew whether Grant was in the city—that is my impression—and I think that he said he had to go back to New York on an early train and wanted to know if I couldn't see Mr. Grant as to whether he would receive these packages, and then when he came back——

Q. Now, just one minute. Is that the substance of what he said at that first interview?

A. Why, that is practically it, Mr. Stephenson, but, of course, I can not remember all that occurred, you understand.

Q. What did Mr. Burlingame say at the second interview, on the same day in the afternoon?

A. I believe I answered that before, by telling me what to do with these packages that he had referred to as to Mr. Grant having possession of them.

Q. Now, Mr. McLean, fixing your mind on the time you received this letter from Mr. Burlingame, did that letter come to you through the mail?

A. Certainly, I should think so; I do not recall whether the carrier gave it to me, but I presume it came through the mail.

128 Q. And did you open the letter?

A. Yes.

Q. Now, what was in that envelope which you opened?

Judge KREKEL. You don't ask him for the contents of the letter, do you?

Q. Well, I will put this question: Was there more than one document in that envelope?

Judge KREKEL. I object to that.

The REFEREE. Don't you mean, was there an enclosure in the envelope?

Mr. STEPHENSON. Well, I assume the letter itself is an enclosure.

Q. Was there more than one document in the letter?

Mr. FLANNAGAN. I object to that as immaterial; the contents of that envelope which came to this witness, as he has already testified, was in connection with Mr. Grant, and whatever information this

witness got by opening that envelope, as to what it contained, that information is confidential and should not be disclosed by this witness, and it is also immaterial and inadmissible.

The REFEREE. Was there anything in that envelope which indicated to you, or which indicated the reasons for which any packages or any boxes were to be delivered to Mr. Grant?

The WITNESS. Yes, sir.

Q. Now, what was the reason given in that letter?

The REFEREE. What was it that indicated the reason for
129 which Mr. Grant was to have possession of the packages and boxes?

The WITNESS. The letter indicated to me that I should take it to him—the other enclosure—but there wasn't anything in the other enclosure to tell me to take it to Mr. Grant.

The REFEREE. I don't think you understand me. I think you are saying to me that the letter indicated that the packages and the boxes, or whatever represented them, were to go to Mr. Grant?

The WITNESS. Yes.

The REFEREE. I did not ask that. I asked whether there was anything indicating the reason why they should go to Mr. Grant, or the purpose for which Mr. Grant was to get them?

The WITNESS. I do not recall that.

Q. Now, what was in that envelope in addition to this letter?

Judge KEENER. I object to that.

The REFEREE. Unless there is something that bears on the capacity in which Mr. Grant was to hold whatever he got, it is immaterial, I think.

Q. Now, Mr. McLean, was there a bill of lading or shipping receipt in that envelope?

Judge KEENER. I object, if your honor please, for the reasons previously stated, that it is immaterial and that it calls for a
130 disclosure of the relation between Mr. Burlingame and his agent.

(Objection sustained. Exception.)

Q. Mr. McLean, did you deliver to Mr. Grant any bill of lading or shipping receipt which you obtained in that envelope?

(Same objection, ruling, and exception.)

Mr. FLANNAGAN. And we add further to our objection that it would tend to show the delivery by an agent of property to an attorney which the principal of that agent could not be required to produce, or which the principal could not be required to disclose if it had not been delivered to the attorney, on the ground it would tend to incriminate him and on the ground that it was a professional communication and privileged.

Q. Now, Mr. McLean, have you known Mr. Burlingame some time?

A. Yes; quite a number of years.

Q. Mr. McLean, in doing these acts for Mr. Burlingame, were you acting as his friend?

A. Why, I should say yes. I presume I wouldn't be his enemy in doing it.

Q. But this was a friendly act?

A. The same as if you would come in, Mr. Stephenson——

The REFEREE. He was acting for him; that is all there is about it; he did it for him.

(No cross-examination.)

181 MARGARET E. BURLINGAME, being duly sworn and examined, testified as follows:

By Mr. FLANNAGAN:

Q. Mrs. Burlingame, I show you a paper marked "Respondent's Exhibit A." Did you sign that paper?

A. That is my signature. I signed it; yes.

Q. Will you please state what occurred at the time that you signed that paper?

A. Well, what do you want to know?

Q. Just what happened.

A. Just exactly?

Q. Yes; just exactly what happened.

A. Well, Mr. Burlingame came to me and told me that the company was to be dissolved and that he was to take over everything of the company; everything was to be his, and that I was to sign over what I had.

Q. And then you signed that paper?

A. Yes; I signed that paper.

Q. Now, did you sign it on the day it is dated?

A. I certainly did; yes, sir.

Q. And then what did you do with it after you signed it?

A. I do not remember.

Q. Well, did you give it to Mr. Burlingame?

A. Yes; I suppose I must have given it to him.

Cross-examination by Mr. STEPHENSON:

Q. Can you recall where you were when you signed this paper?

A. Not exactly.

182 The REFEREE. What year was it, do you know?

The WITNESS. 1909, I should say.

Q. Was it in New York City?

A. Yes.

Q. Was it at the office of The Ellsworth Company?

A. I cannot remember that.

Q. Have you ever been in that office?

A. Yes; I was there.

Q. Is the body of this paper, Exhibit A, in your handwriting?

A. No; it is not.

Q. In whose handwriting is that?

A. Mr. Burlingame's.

Q. Did he write it in your presence?

A. I cannot remember that.

Q. Were you a director of The Ellsworth Company?

A. I simply at that time, before I signed this paper—I had as a mere matter of form—I had one share.

Q. What did you pay for that share?

A. Nothing.

Q. Who gave it to you?

A. Mr. Burlingame.

Q. Did he give you a certificate of stock?

A. No; I never had any certificate.

Q. When did he give it to you?

A. Well, I did not have a certificate.

Q. When did he give you the share of stock?

The REFEREE. How did he give you the share of stock?

Judge KEENER. Won't you put it, when did he give her an interest, Mr. Stephenson? Ask her that.

133 Q. When did he give you this share of stock?

A. I do not think I know exactly what you mean. I understand a share of stock is a certificate, a paper. I never had a paper.

Q. Did you ever own any other stock than this one share?

A. In The Ellsworth Company?

Q. In The Ellsworth Company.

A. No.

Q. Did you ever attend a meeting of the board of directors of that company?

A. Well, I can not remember that; I have no recollection of any meeting.

Q. How did Mr. Burlingame give you this share? You said he gave it to you. How did he give it to you?

A. Well, I said before that I did not remember receiving any—that I did not receive, never have received, a paper or certificate. That is what I mean by a share.

Q. What do you mean when you say he gave you a share; tell us what you mean?

A. Well, I mean that I simply was to be, as I understood it, I was simply to be, as a matter of form, that I was to hold nominally a share of stock, that is all.

Q. That is what Mr. Burlingame told you?

A. That is what he told me; yes.

Q. Did you ever vote that stock at any stockholders' meeting—ever vote it?

A. No; I never did.

Q. Did you ever attend a meeting of the stockholders?

A. No.

134 Q. Did you ever give your proxy to anyone to vote that share?

A. I do not remember of ever doing it.

Q. Did you read this before you signed it?

A. I did.

Q. How do you fix it as having signed it on December 31, 1909?
A. Well, I wouldn't have remembered it if it hadn't been dated.
Q. Did you sell any property to The Ellsworth Company?
A. I sell any property?
Q. Yes.
A. No; I never did.
Q. Did you transfer any property to that company?
A. I never had any—I don't know what you mean exactly.
Q. Do you know what property is?
A. Yes; I know what property is.
Q. Now, did you ever transfer or sell any property to the company?
A. No, that I remember.
Adjourned to Saturday, May 4, 1912, at 10.30 a. m.

135 IN THE MATTER OF WALTER B. GRANT.

NEW YORK, *May 7, 1912.*

Present: The Referee, Judge Keener, Mr. Flannagan, Mr. Stephenson.

CLARENCE H. MCINTYRE, called as a witness, being duly sworn and examined, testified as follows:

By Mr. FLANNAGAN:
Q. Mr. McIntyre, I hand you a paper, respondent's Exhibit C. Did you sign that paper, and is that in your handwriting?
A. Yes, sir.
Q. It is in your handwriting and you signed it—both?
A. Yes.
Q. Now, I hand you another paper, respondent's Exhibit B, and I ask you the same questions in regard to that paper?
A. Yes, sir.
Q. Now, when did you sign those papers, Mr. McIntyre?
A. On the day dated, December 31st.
Q. Do you recall what occurred at that time?
A. Simply in a general way.
Q. Well, then, will you kindly state what happened and what was said to you at that time, as near as you can?
136 A. I was called into Mr. Burlingame's office, and he said that as he had taken the entire Ellsworth Company as his own property that he wanted my resignation, which was given.
Q. Well, there is another paper there, Exhibit B, which touches on another subject. Will you look at that and say if anything was said on that subject?
A. That was simply as a matter of form. That paper was issued simply as a matter of form relinquishing any apparent rights which I had.
Q. Now, had anything been said to you at any time previous to that occasion about the winding up of this company, The Ellsworth Company of Arizona?

A. In the middle of the summer Mr. Burlingame said to me that he was going to cease conducting his business under the title of The Ellsworth Company and that the accounts, and so forth—for me to give the orders that the accounts, and so forth, and everything, were to be turned over to him.

Q. Did you ever have a certificate for any share of stock in The Ellsworth Company?

A. I did not.

Q. Did you ever pay anything for any rights as a stockholder in The Ellsworth Company?

A. I did not.

Q. Now, how did you happen to have an apparent interest there as a stockholder?

A. At the formation of the company by Mr. Burlingame he said to me, "I wish you would let me use your name and I will allow—
I will issue one share to you, which you will endorse back to
137 me at once, simply for the purpose of qualifying," so that I might conduct business for him as an officer of the company.

Q. But a certificate was never, as a matter of fact, issued?

A. There was no stock certificate ever issued.

Q. Now, in regard to the directions that you gave from time to time in connection with The Ellsworth Company. Did you have any consultation with Mr. Burlingame before giving any directions?

A. I received all instructions from Mr. Burlingame and carried out his instructions.

Q. And did that apply to the payment of money for the company?

A. In all instances—that is, allow me to explain that: The first payments were—he was always consulted on the matter of payments, except future payments, like commissions, where a basis had been established, which was routine work, but in all instances where first payments were made, or anything of that kind, any matter of importance was brought up, then Mr. Burlingame—it was put before Mr. Burlingame for his sanction and for me to receive authorization.

Q. Now, what was your position with respect to Mr. Burlingame?

A. An employe—really a confidential man.

Q. And were you associated with him in many matters?

A. I acted for him in practically all of his work.

Q. Now, did he ever say anything to you on the subject of what reason he had for desiring to take over to himself the assets of this Ellsworth Company?

138 A. There was some talk relative—in the summer relative to the income tax, and so forth. Outside of that I think I know of nothing else.

Q. Now, you stated a few moments ago that at the time you signed these papers—Exhibits B and C—that Mr. Burlingame said he had taken over the assets; is that correct, or was it that he was taking them over?

A. He was taking them over.

The REFEREE. You said he was going to discontinue doing business under the name of The Ellsworth Company?

The WITNESS. Yes.

The REFEREE. You didn't mean to intimate that he was going to discontinue doing business, or did you?

The WITNESS. The work of the——

The REFEREE. Stop business, or stop that particular company?

The WITNESS. Stop that particular company.

Cross-examination by Mr. STEPHENSON:

Q. Then the business was to go on, was it?

A. He took everything. I did not know anything about what he was going to do with it after that.

The REFEREE. Your connection with the business ceased at that time?

The WITNESS. I went with another company.

Q. And what was the other company?

A. The Ellsworth Corporation, and also as a special man
139 for Mr. Burlingame; I was working for him.

The REFEREE. Did your relations change or practically go on the same?

The WITNESS. Practically went on the same except I worked for The Ellsworth Corporation.

Q. Were you an officer of The Ellsworth Corporation?

A. I was not.

Q. Now, did you hand your resignation in in blank some time before December 31, 1909—a resignation undated, I should say?

A. I did not.

Q. Did you do that in any instance?

Judge KEENER. I object to that, if your honor please, what he did in other instances.

The REFEREE. Objections sustained. What difference does it make? He says he was a dummy.

Q. Now, you have no distinct recollection, have you, as to that conversation in the summer of 1909?

A. Yes, sir.

Q. What recalls it distinctly to your mind at this time?

A. From the fact that I had been on the road and returned and the order was given me upon my return, to issue orders to the bookkeeper to close up—close all work with The Ellsworth Company, and Mr. Burlingame opened at that time an account of his own.

The REFEREE. Well, did he do any of the business that had
140 previously been conducted by The Ellsworth Company, in his own name after that?

The WITNESS. Yes.

The REFEREE. In his own personal name?

The WITNESS. Yes.

Q. About when was this that you returned?

A. I came back the last of June.

Q. And you say an account was opened in Mr. Burlingame's name. What do you mean, a bank account?

A. He always had a bank account.

Q. What did you mean when you said an account was opened in his name?

A. As I understand it, a set of books were opened for Mr. Burlingame.

Q. Did you open those books?

A. I did not.

Q. Did you direct them to be opened?

A. I did not.

Q. Do you know whether they were opened?

A. I know they were opened.

Q. And when were they opened?

A. I cannot say the date.

Q. Was it shortly after you got these instructions, towards the last part of June, 1909?

A. It was.

Q. Within a month or so?

A. Well, just the time I cannot say.

Q. Well, then, can you say within two months?

A. Within a short time.

141 Q. And what does a short time mean to you?

A. Well, it might be one week and it might be two months.

Q. That is what I want to know. Now, who did you direct to open these books?

Judge KEENER. He said he did not direct anybody. That is the answer that is on the record.

The REFEREE. He says he knows they were opened.

Q. Well, who did open them?

A. I do not remember.

Q. Who charge of them?

A. One of the bookkeepers in the office; I cannot say which one.

By the REFEREE:

Q. Was there a separate set of books for the new company that you went with, The Ellsworth Corporation?

A. They evidently kept a separate set of books.

Q. And after The Ellsworth Company was abandoned the business went on—the same business in the name of Mr. Burlingame personally?

A. Yes; some of it.

Q. And the other business in the name of The Ellsworth Corporation?

A. Yes.

Q. Kept in the same office?

A. Yes.

By Mr. STEPHENSON:

Q. Now, in the middle of the summer of 1909 you testified that Mr. Burlingame said he was going to cease conducting his business under the title The Ellsworth Company?

A. Yes.

Q. And that he gave orders that all accounts were to be
142 turned over to him, is that correct?

A. Yes.

Q. And that was in the middle of the summer of 1909?

A. Yes.

Q. And did you proceed to have the accounts turned over to him?

A. I gave the order that all accounts were to be turned over to him.

Q. And did you see whether that order was carried out?

A. It was executed.

Q. What do you mean by the accounts turned over to him?

A. In other words, The Ellsworth Company was always Mr. Burlingame's, and he simply ceased doing business under that name and took them to his own name, under his own name.

Q. What did you mean by turning the accounts over to him; was it a bookkeeper's entry, or what was it?

A. A bookkeeper's entry.

Q. And what was that bookkeeper's entry?

A. I do not remember.

Q. Do you mean that these were accounts which were due The Ellsworth Company and were assigned to Mr. Burlingame?

A. They were all his accounts anyhow.

Q. But these accounts appeared on the books of The Ellsworth Company, did they not, as belonging to that company?

A. Yes.

Q. And do I understand you to say that these accounts were turned over to Mr. Burlingame?

143 A. They were all turned over.

Q. And how were they turned over; was there a written assignment to him?

A. I do not remember that.

Q. Well, was it a bookkeeping entry?

A. Yes; I believe so.

Q. That is, the entry was crediting Mr. Burlingame with certain accounts which appeared on the books to the credit of The Ellsworth Company, is that correct?

A. I do not remember just the entry.

Q. Now, did he give you orders to turn anything else over to him besides the account?

A. All the physical assets of the company.

Q. And that was given in the summer of 1909?

A. Yes, sir.

Q. Are you sure that he told you to turn them over to him?
A. Yes.
Q. And was that done?
A. His orders were carried out.
Q. How about the furniture of The Ellsworth Company?
(Not answered.)

By the REFEREE:

Q. When you say turn over to him, was there any change so far as the physical situation was concerned?
A. I do not understand the question.
Q. Well, I mean, suppose I am a corporation, or I own all the stock of a corporation, and I am doing business now under the name of that corporation, and I got that box up there—
144 the box sitting up there on the cabinet—and I abandoned that corporation and go right on in my own name. I might say that I have authorized you to turn that box over to me, although it has never been moved from that place. Was it that kind of a turning over?
A. No.
Q. What kind of a turning over was it?
A. I know he took and disposed of everything that belonged to The Ellsworth Company.
Q. You know that, do you?
A. Yes.
Q. And do you know about the books of The Ellsworth Company; what happened to them at that time, if anything; as far as you know, did they stay just where they were?
A. As fas as I know, Mr. Burlingame took them; I never saw them after.
Q. Do you know whether he did or not take them?
A. He did, as far as I know.
Q. Well, I do not understand that. Do you know that he did or did not? Now, you either know that he did or that he did not, or you didn't know anything about it.
A. I did not see him taking them.
Q. And you have no personal knowledge of your own, no absolute knowledge of your own that he took them?
A. No.
Q. Then say so.
A. I have no absolute knowledge of my own on that subject.

By Mr. STEPHENSON:

Q. I think I was asking you about the furniture of The
145 Ellsworth Company. Did you turn that over to Mr. Burlingame?
A. That was turned over at his order to The Ellsworth Corporation.

Q. And The Ellsworth Corporation continued the business of The Ellsworth Company, did it not?

A. Some of it.

Q. Now, what part didn't it continue?

A. A great part of the work was done after that under Mr. Burlingame's own name.

Q. And what was that?

A. That is—there were different things; I cannot specify exactly.

The REFEREE. If you don't know just say so, always. You are not bound to know, but if you do know you must tell, but if you don't know it say so, because you are not obliged to feel that you ought to know.

Q. Your first answer to Mr. Flannagan's question was that Mr. Burlingame said that he had taken over the property of The Ellsworth Company, and then Mr. Flannagan asked whether he said he had taken it over, or was taking it over, and you corrected yourself and said that he was taking it over.

A. He was taking it over.

Q. How can you recollect at this time, which is about three years afterwards, that he said he was taking it over, rather than he said he had taken it over?

A. The very fact that I turned in my resignation—that I turned in Exhibit B to him, proved to me that he was taking all the assets of the company.

146 By the REFEREE:

Q. That is what you base your answer on, is it?

A. Yes; that is what I base it on—base my answer on.

Q. Anything else?

A. And the conversation previous to that during July.

Q. Well, what was that? We want to know all about it, but not what you are guessing about it; just what you know.

A. I am not guessing.

Q. Now, tell us everything that you base that statement on?

A. I base that statement on the fact that he came to me in July and asked that all the physical assets, and so forth, of the company be turned over to him, which was done.

Q. Do you know in what way?

A. That is, from July on——

Q. You say physical assets?

A. Yes.

Q. Can you say how they were transferred—in what way?

A. I can not say just now.

Q. You don't know?

A. No.

Q. Was there anything that you did in connection with the transfer of the physical assets?

A. No further than to give the order to have it taken care of and to direct that it be done, because I was on the road a great deal of the time.

Q. You say physical assets.

A. All assets of any nature. That is the meaning I had in mind.

147 Q. And what was your direction to have that done—a direction to make book entries showing that it had been done?

A. Book entries and any other method that was necessary.

Q. Do you know of any other method?

A. I do not.

By Mr. STEPHENSON:

Q. When was this that Mr. Burlingame said he was taking over the assets of The Ellsworth Company?

A. That was in December.

The REFEREE. 1909?

The WITNESS. 1909.

Q. And what time in December?

A. The final work, as far as I was concerned, was transacted on December 31st.

The REFEREE. And what work was done on that day?

The WITNESS. As far as I was concerned, I signed these.

The REFEREE. That is all?

The WITNESS. That is all.

Q. That is what you mean when you say the final work?

A. Yes.

Q. Now, how do you recall at this time that the words which Mr. Burlingame used were that he was taking over the assets on December 31st, 1909?

A. There had been conferences between Mr. Burlingame and myself; that is, he giving orders to me all the time, whenever I was in the office, from July up to that time, and it was agreed, or he

148 said, that he wanted the books closed or wanted everything in his possession on December 31st.

Q. Now, you said that there was a certain time after which you never saw these Ellsworth Company books. When was that time?

A. To my knowledge I never saw them after the 31st day of December.

The REFEREE. Did you see them on that day?

The WITNESS. I saw them on that day, yes, but I never saw them after, to my knowledge.

The REFEREE. And do you know you never saw them, or don't you remember whether you ever saw them; which is it?

The WITNESS. I do not remember.

Q. Now, did you have anything to do with the report to the Commissioner of Internal Revenue?

A. No, sir.

Q. Were you given any directions for preparing that report?

A. No, sir.

Q. Do you know such a report was filed in March or April, 1910?

A. Yes.

Q. And what did you know about it?
A. I think I knew that they filed a report on that date.
Q. How do you know that?
A. He told me.
Q. Did he tell you he was going to do that or had done it?
A. He told me that he had done it.
Q. But you had nothing to do with preparing that report or giving orders for its preparation?
A. No, sir.
149 Q. And you were given no orders by anyone to have it prepared?
A. No, sir.
The REFEREE. Did you ever have personal charge of the books of The Ellsworth Company?
The WITNESS. I did not.
The REFEREE. Never did?
The WITNESS. No, sir; only through direction.
The REFEREE. What do you mean by through direction?
The WITNESS. Directing other people. The books were never in my charge.
Q. In whose charge were they?
A. In the chief accountant's.
The REFEREE. You mean you directed the bookkeepers or the accountants?
The WITNESS. Yes, sir; I directed the accountant.
The REFEREE. You had nothing personally to do with the books themselves, is that what you mean?
The WITNESS. Yes.
Q. Now, why didn't you turn over the furniture to Mr. Burlingame before December, 1909, when he told you to do that about June, 1909?
A. The furniture was turned over at the time he ordered it turned over. It was designated when the stuff was to be turned over.
150 Q. That is, from time to time he designated this to be turned over, and that to be turned over, and that to be turned over, is that correct?
A. Yes.
Q. And that was so with the different accounts which belonged to The Ellsworth Company, that from time to time he said to turn over this account to him, and that account, and that account?
A. Yes.
Q. And so with the furniture, he told you on or about December 30, 1909, to turn the furniture over to The Ellsworth Corporation, is that correct?
A. He told me to turn over to The Ellsworth Corporation the furniture in December. I ordered an inventory of it and turned it over as quickly as I could with the inventory.
Q. How did you turn that over?
A. By a bill of sale.

Q. Did he tell you to take an inventory of the furniture?
A. Yes, sir.
Q. And did he tell you to have a bill of sale executed?
A. Yes, sir.
Q. And did he tell you why?
A. No, sir.
Q. And you executed that as an officer of The Ellsworth Company, did you not?
A. I executed it on his request.
The REFEREE. Well, I know, but he asked you a question. You executed that as an officer of the company?
The WITNESS. Yes.
The REFEREE. Now, either you did or you didn't.
151 The WITNESS. I did.
Q. Now, did you ever execute any bill of sale for the books of the company to Mr. Burlingame?
A. Not that I recollect.
Q. Did he ever ask you to?
A. I have no recollection.
Q. But if he had asked you to do that you probably would have carried out his directions?
A. Yes.
Judge KEENER. I object to that as purely a hypothetical question as to what the witness would have done.
The REFEREE. It doesn't make a bit of difference. It don't help anything. He was his confidential man and doing what he was told to do. I presume he would have done it if he was told to.
Q. And I understood you to say that Mr. Burlingame said the reason he was taking over the assets was to avoid the payment of the corporation tax, is that correct?
A. That was the only reason I ever heard given.
Q. And that reason he gave you in the summer of 1909?
A. Earlier in the year.
Q. And did he tell you that for the purpose of avoiding that tax, that everything should be turned over before the beginning of the new year, 1910?
A. Yes.
Q. Now, regarding this first share of stock. Will you please state again just what Mr. Burlingame said to you regarding that first share of stock?
152 Judge KEENER. The one share of stock.
Mr. STEPHENSON. Yes; the only share of stock.
The WITNESS. He said to me that he was organizing a company for himself to transact his business under and asked me if I would allow him to use my name, for which he would place one share of stock in my name so that I might qualify.
Q. And then about signing that stock over, what did you say?
A. It was to be returned to him; I was simply to qualify.
Q. Well, did you over sign over to him that share of stock?

A. There was never any stock issued to me.

Q. Was there ever any entry made on any of the books of the company showing that you were the owner of that one share?

A. I can not say as to that.

Q. Did you write out Exhibit B and Exhibit C at the same time?

A. This was written first, Exhibit C, and later he wanted this.

The REFEREE. When you said "this" mentioned what the exhibit is.

The WITNESS. On the same day he wanted Exhibit B, and I sat down and wrote it out.

Q. Was that in the office of The Ellsworth Company?

A. Yes.

Q. Are you employed by Mr. Burlingame now?

A. No, sir.

Q. Are you employed by any concern in which he is in-
153 terested?

A. No, sir.

Q. Did you get your position through him?

A. No, sir.

The REFEREE. Are you in business now?

The WITNESS. Yes.

Q. Did he recommend you to this position?

A. No.

Q. You got it of your own accord?

A. I am in business for myself.

WALTER B. GRANT resumed the stand.

Redirect examination by Mr. FLANNAGAN:

Q. Mr. Grant, coming back to the time when you had your first talk with Mr. Burlingame in regard to any packages or boxes. I wish you would state, please, what was said at that time in regard to your opening any packages or box.

A. I think it was early in September, and it may have been the last of August.

Mr. STEPHENSON. 1911, I suppose?

The WITNESS. Yes; last year.

Q. Now, what was said then, Mr. Grant, on that subject?

A. To the best of my memory, after he had brought two packages to me, he stated to me that he desired to consult me about them, and I said that at that time I couldn't take it up, and after we had
154 taken those packages to my other office, where I told him we could work on the matter more undisturbed, and, as I recall, I said to him, "Well, Mr. Burlingame, when you wish to go into this matter notify me and give me a day or two notice, so that I can arrange to take up this matter with you." I do not remember that there was anything said in regard to opening them at that time or not.

Q. Now, was there anything said as to why you could not take up the matter in connection with those papers at that time?

A. I told him I was too busy for that day.

Q. On that day?

A. Yes.

Q. Now, what did he say specifically on the subject of opening or not opening the packages or whatever they might be?

The REFEREE. He said he didn't recall that he said anything.

The WITNESS. I do not recall that he said anything. He might have mentioned as he went out——

The REFEREE. If you don't recall, I wouldn't guess about it, Mr. Grant.

The WITNESS. No; I wouldn't want to guess at it. I think I have answered that.

The REFEREE. Of course, if, on further consideration you remember anything, that is different.

The WITNESS. I do not. It so vague, you know.

Q. Were you leaving Boston at that time or not?

A. No, sir; I do not recall that I was at that time.

155 Q. Were you going into court?

A. I was going into court at that time. As I recall it, he came into my office about one o'clock and I had to go into court at two when our afternoon court opens.

Q. Now, I show you a telegram, Mr. Grant, or what purports to be one. Did you receive that?

A. I did. I received that at El Paso, Texas.

Q. Was that just in the condition it is now when you received it, torn in the way it is now?

A. As I recall it, that was received by me about five o'clock in the evening and the envelope was wet and I started to tear the end and tore the envelope as it twisted, and that was the condition it was in when I opened it, although it wasn't sent that way I presume.

The REFEREE. You probably tore it yourself?

The WITNESS. I tore it; yes, sir.

Mr. FLANNAGAN. I offer this in evidence, this telegram, purporting to be a telegram to Walter B. Grant, at Toltec Club, El Paso, from E. E. Burlingame, dated March 12th.

The telegram referred to was received in evidence and marked "Respondent's Exhibit E" of this date.

Q. What year did you receive that in, Mr. Grant?

A. 1912.

Judge KNOX. Do you remember the date?

156 The WITNESS. I received it on the day of its date. I have forgotten the date.

The REFEREE. It is dated March 12th?

The WITNESS. Yes.

The REFEREE. You received it March 12th?

The WITNESS. Yes.

Q. Now, after you came to New York, in response to the Government subpœna, from El Paso, as you have testified, was anything said

to you by Mr. Burlingame on the subject of opening any packages or boxes?

A. Yes, sir.

Q. Well, where was that, Mr. Grant?

A. That was at the Bar Association library.

Q. And what was said on that subject at that time?

Mr. FLANNAGAN. I may say before proceeding, that I am simply offering this in evidence on the one issue of whether Mr. Grant was or was not a warehouseman, and that I understand that fact is an issue which your honor rules is open, and I am not offering this for any other purpose.

The WITNESS. Mr. Burlingame at that time instructed me not to open the box or two packages for the purpose of producing them in court or for the purpose of disclosing what the contents were.

Q. Now, other than those instructions with reference to the opening of the box or packages, can you recall any others?

A. I do not.

157 The REFEREE. Do you remember whether he ever asked you to keep on holding them in your office?

The WITNESS. I do not. I could answer that by saying——

The REFEREE. You are quite clear as to the purpose for which they were there, are you?

The WITNESS. Yes, and the original purpose was never changed and never has been.

Judge KEENER. And what was that purpose?

The WITNESS. As I have stated here, that he said he wished to consult me and secure my advice about them, and I told him I hadn't the time to do it then, and he then said that he would like to leave them with me, and at my suggestion we took them to my other office where I had private work and—where I wouldn't be disturbed, and it was that time that occurred what I have said in regard to your first question as to whether there were any instructions. There were no instructions not to open them at that time, as I recall.

Q. Now, this other office that you refer to, you did use for consulting clients, did you not?

A. Quite frequently if it related to some extended work.

Q. Was anything said, Mr. Grant, in this conversation just referred to in regard to any defense of Mr. Burlingame?

A. Yes, and more particularly, a month or more later when

158 he came to my office——

Mr. STEPHENSON. I think the question refers to this particular time, this one time.

Q. At this conversation within a month or so later, was anything said in regard to his defense?

A. At that time he was there, as I remember, an hour or more and talked about the defense of several matters.

Q. That is, his defense?

A. Yes.

The REFEREE. The defense of him?

The WITNESS. Of him.

Cross-examination by Mr. STEPHENSON:

Q. This first time that you saw Mr. Burlingame in Boston you said he had two packages with him?

A. Yes, sir.

Q. And are those the same two packages that you have heretofore testified are in your office in the Board of Trade Building still unopened?

A. Yes.

Q. The same two?

A. The same two.

Q. And did he have the box with him?

A. No, sir.

Q. What did he say about the box?

A. He said after we got down there, he said "there is a box that I want to send to you also in connection with this matter, and will that be all right?" And I said "All right, send it."

Q. And did you tell him where to send it?

A. There at that place; yes, sir.

159 Q. When you told Mr. Burlingame that you were too busy to consult with him on that day, which I think was about one o'clock, just before going to court, did you fix any time when you would consult with him at any other time?

A. No, sir; other than as I have said, if he would let me know, give me a day or two notice, I would fix a time. I will state at this particular time I just had returned from El Paso where I had been representing the United States consul in the boundary question on the Shamisal dispute, and my office business was all driven together.

The REFEREE. You subsequently did consult with Mr. Burlingame?

The WITNESS. Yes.

The REFEREE. In regard to the subject of his defense?

The WITNESS. Yes.

The REFEREE. And in regard to the subject that the books were to be used with that were in the box or packages, and the box he was to send you as counsel?

Judge KERNER. That brings us right down to the question as to the location of these books, Mr. Referee.

The REFEREE. Leave out all about the books. Now, he is talking about two packages and a box, and he says they were in his possession, and that they are there now because he is his lawyer and

160 is to be consulted about them. Now, they weren't used. The packages and box haven't been opened, but he said they were going to consult about them, isn't that so?

The WITNESS. Yes; I assume that he wanted——

The REFEREE. I understood you to say that.

The WITNESS. I assume that is so. Mr. Burlingame came on to talk about two or three matters, one of which was that he had been indicated on some charge, and there were some other matters that he talked to me about.

The REFEREE. But in any subsequent conversation you did have the packages and box were not used?

The WITNESS. No, sir.

Judge KEENER. And these packages and box were not used by you?

The REFEREE. I mean used for the purpose of the consultation?

The WITNESS. No, sir; I never opened them, and I do not know the contents of them. I could surmise some things, to be sure, but I do not want to.

Q. Now, when you said on that day that you didn't have time to consult with him then, did he ask you if he could leave those with you?

A. Yes, sir.

Q. And what did you tell him?

A. He asked me if he could leave them at my other office, and I think he said, "Can't I leave these in your safe?" My recol-
161 lection is that he spoke of the safe, and I said, "No; my safe isn't large enough with its contents," and then he said, "I want to leave them," and I said, "If you are going through a long matter, I would prefer to take them to the other office," and we took them to the other office. He took one bundle and I took the other.

Q. Now, this defense concerning which he consulted you, that was the defense on the indictment covering the Sun Generator, wasn't it?

Judge KEENER. I object to that.

(Objection overruled.)

A. Yes; that was part of the conversation.

Q. That Sun Generator indictment?

A. Yes; I think it was part of it.

Q. And did he consult you about other matters at that time, too?

A. Yes, sir.

Q. But the matters of defense which he consulted you about were matters relating to the Sun Generator indictment, weren't they?

Judge KEENER. I object to that.

Q. Did Mr. Burlingame pay you a retainer for this defense?

Judge KEENER. I object to that as quite immaterial.

The REFEREE. That is immaterial. Objection sustained.

Q. Now, has he consulted you—I am not asking you what
169 he said in the consultation—but has he consulted you about the contents of these packages or this box?

A. Not in reference to the box and packages themselves, other than I might have referred to them at that second interview——

The REFEREE. The same subject matter he is talking about, not the physical thing.

The WITNESS. Yes—after that box had come to my other office.

Q. Now, Mr. Grant, do you keep an office diary showing your consultations, date, and so forth?

A. In a measure, I do. My stenographer make notes of part of the things that occur, I find later, but my general charges go in a lump, as a rule—that is, for the subject matter rather than the details—although we have some reference wherein Miss Cunningham might make a note of somebody's call, but it isn't by any means accurate. There are many things that I do not think to speak of, or I am too busy to speak of, and I make no special charge for each interview, except in special cases; I make it more in a lump sum.

Q. Do you know whether or not Mr. Burlingame had other attorneys that he was also consulting regarding this case at that time?

Judge KNOX. I object to that. What relation has that, or what bearing has that, on whether Mr. Grant was his attorney, whether he had other attorneys?

163 (Objection overruled.)

A. Why, he told me he had New York attorneys and gave me their name, and he told me who they were, and told be their antecedents, as he understood them.

Q. Mr. Grant, is your practice—do you specialize in any particular kind of practice?

A. I do not.

Q. Do you practice in many criminal matters?

A. Not a great many; perhaps half a dozen a year. I am more particularly in equity work, and I have tried a great many tort cases, personal injuries, in my day. My practice is general.

The REFEREE. Occasionally draw a will, I suppose?

The WITNESS. Indeed, I do; a great many for clients.

Q. Do you recall, Mr. Grant, receiving a letter from Mr. McLean, a letter addressed to Mr. McLean by Mr. Burlingame; do you recall receiving such a letter?

Judge KNOX. I object to that, if your honor please.

The REFEREE. I will allow him to answer that question.

The WITNESS. Unless Mr. Burlingame waives the privilege it seems to me that that question goes to the reference, to the referee, in relation to whether or not I received a bill of lading or shipping receipt for certain goods.

164 The REFEREE. Well, you can say whether it does or not, you know.

The WITNESS. It does.

The REFEREE. If you know.

The WITNESS. I should say it might lead to that particular question, and therefore I refuse to answer it on the ground of privilege, a privileged knowledge or privileged communication.

Mr. STRETHERSON. But I think if there was any privilege on that it has been waived.

Judge KNOX. Who waived it?

Mr. STRETHERSON. The testimony of Mr. McLean.

The REFEREE. If you object to it, I think I will sustain the objection. I do not think I need it.

Judge KEENER. We do object to it.

Q. Mr. Grant, at the direction of Mr. Burlingame, either directly or indirectly, have you received or directed the delivery of any other packages or box than these two packages and that box which you testified were in your office in the Board of Trade Building?

Mr. FLANNAGAN. I object to that as entirely outside of the issue in this proceeding.

(Objection sustained.)

165 The REFEREE. You stated positively, didn't you, that you didn't have possession of the books or documents called for by the subpœna unless they were in certain packages or a box that were in your possession, but which you hadn't examined for the reason that they were sent to you by Mr. Burlingame for the purpose of consultation?

The WITNESS. Yes.

Q. Now, Mr. Grant, what do you mean by possession?

A. Why, I mean I do not possess or control—if you are trying to get a definition of possession, that is what I mean.

Q. You mean you haven't possession of any other records at your house?

A. No, sir; it is no subterfuge at all.

Q. And you haven't possession of any anywhere at a warehouse or storage, is that what you mean?

A. No, sir; I think you asked me that before—possibly that was before the grand jury.

The REFEREE. Well, I understood you to say at your house or office or warehouse, or with friends anywhere, that unless the books and papers called for by this supœna are in the two particular packages or in one particular box that you are without power to produce them?

The WITNESS. Yes.

Judge KEENER. Because he neither possesses them nor controls them.

166 The WITNESS. That is right.

Q. Did you send a telegram to Mr. Burlingame to which this respondent's Exhibit E is a reply?

Judge KEENER. I object to that.

(Objection overruled.)

A. I will state that I wired Mr. Wise, or to you, in answer to a telegram from him as to whether I would or could do certain things, and I answered you, and at the same time I wired Judge Keener, and I waited—I am not sure which I answered first, but I certainly wired Judge Keener, and I waited until one o'clock the next day, and getting no answer I wired you to see Judge Keener, and then this came up later in the same evening from Mr. Burlingame.

Q. You don't know whether Mr. Burlingame sent this or not, do you?

A. I do not, except that it would answer the telegram that I sent Judge Keener as his attorney.

The REFEREE. Well, there isn't any question, is there, but what Mr. Burlingame, if he has any right, has exercised them over this attorney, if he is his attorney, is there? That telegram is introduced to show that the privilege is not waived. If any privilege exists, Mr. Burlingame insists on. We all admit that, don't we?

Mr. STEPHENSON. Yes; that he insists on the privilege.

167 The REFEREE. Is there anything else in that telegram?

Mr. STEPHENSON. I want to get the complete transaction. This is only one side of the correspondence. I want the other side.

The REFEREE. As bearing on the question of whether the privilege is waived or asserted?

Mr. STEPHENSON. Yes.

The REFEREE. Well, if you have any doubt as to whether or not the privilege is waived, why you can go into it further.

Q. Now, what did you say in your telegram to Judge Keener?

A. I think I have a copy of that here. I suppose, however, it is a confidential communication.

Mr. FLANNAGAN. We object to it on the ground that whatever was said to Judge Keener was simply a communciation between counsel.

Judge KEENER. This telegram is complete in itself. It says there is no waiver of the privilege. Now, what caused him to send that is quite immaterial.

Q. Have you that telegram?

A. I have a copy that I retained, and I think it is accurate.

Q. What is it?

A. "El Paso, Texas, March 11, 1912. William A. Keener, Esq., 52 Wall Street, New York, New York. Wise wired last week,
168 subpoena issued for books, papers of Ellsworth traced to my possession. I wired would be detained here two weeks and would see him on return. He wires to-day immediate action necessary to secure justice and to wire information. Shall wire him to-morrow that my information and papers derived as attorney for Burlingame and I believe privileged until B. or you release privilege, and to see you. Wire me immediately any information I need and advise me."

Judge KEENER. And do you want on the record a formal statement that Judge Keener never replied to the telegrams?

The WITNESS. That came next afterwards, and it is the only answer I got from my telegram.

Q. Now, Mr. Grant, at this second interview you refer to with Mr. Burlingame, did he open either the packages or box in connection with the consultation that you had?

A. No, sir.

The REFEREE. Did he have any consultation with you at any time after he had opened the packages or box?

The WITNESS. He came to me on this day that I speak of or the day before, but I think it was the same day, and said that he wanted to open one of the packages, and I went with him to the other office

and he opened it, and I do not know—this was either on that same day, or I think it was possibly the next morning, I wouldn't say
169 certainly at which time, but we had a long interview, the one I have described heretofore.

By Mr. FLANNAGAN:

Q. That is the interview you have described?

A. Yes.

Q. How long after you received these packages from Mr. Burlingame did this consultation that you have testified to occur?

A. I think about a month; it may have been three weeks, and it may have been six weeks; I cannot definitely tell you.

Q. And this is the occasion when Mr. Burlingame looked into these packages—this last interview; this last interview is the occasion when Mr. Burlingame looked into these packages?

A. I think it was the same day.

Q. Now, did you see the contents of the packages?

A. I did not.

Q. Was it prior to the interview?

A. It was prior to the interview.

By Mr. STEPHENSON:

Q. Were you present when Mr. Burlingame opened the package?

A. I was in the same room, but not present—I mean I wasn't with him at the package.

Q. Did you show him where the package was?

A. Oh, yes, sir.

Q. And you did yourself see him open it, did you?

A. I know it was opened.

Q. How do you know it was opened?

170 A. Well, my memory is this: My recollection is I went to the safe and took out a check book and drew a check, and I remember at that time something of a single paper like that—[indicating] not like that, but I mean a single paper—I have a picture in my mind that while he was at that package I saw a single paper that I thought he took out.

Q. That is, you saw one in his hand, you mean?

A. Yes; one in his hand. I wouldn't say that he took it from there, but I carry that impression from the mental picture I have of it.

The REFEREE. Did you see the box or package untied?

The WITNESS. No; I did not. He was at one end of the room, and I was at the other.

The REFEREE. Was there anything to indicate that this package had been opened and closed again?

The WITNESS. The package is just the same now, except that I know for sure that it was opened.

The REFEREE. There is no question about that; you are not guessing about that simply because he had a paper in his hand?

The WITNESS. Not the slightest; I know it was opened.

Q. Did Mr. Burlingame return that paper to the package?

A. I couldn't tell you that.

171 Q. Did he show you the paper?

A. No, sir.

Q. Now, did he put it back in the package?

A. I couldn't say whether he did or not; I couldn't say whether it was a paper he took from his pocket and put in the package or whether it was a paper that he took from the package; all I remember is that while he was working over this package that I remember a white paper in his hand, and then after that he tied it up; I was busy, and I said to him, "There is the package."

Q. Then you don't know whether he took this piece of paper from the package or whether he took a paper from his pocket and put it in the package?

A. I couldn't say. I saw the package there, and I know it was open; that is all I know.

The REFEREE. But none of the books or papers or documents named in the subpœna were actually used by Mr. Burlingame and you in the consultation?

The WITNESS. No, sir.

Q. Did that consultation take place in that same office where the packages were?

A. No; it occurred later in my regular open office.

Q. Did you go direct from this Board of Trade office with Mr. Burlingame over to your other office?

A. My recollection is that we did not; I do not know

172 whether a lunch intervened or some engagement.

The REFEREE. It was some time later on the same day?

The WITNESS. Yes; it was some time later on the same day.

Q. That he consulted you?

A. Yes.

ELIHU E. BURLINGAME, recalled.

By Mr. FLANNAGAN:

Q. Now, Mr. Burlingame, in regard to this Ellsworth Company of Arizona. Who was the manager?

A. I was the manager.

Q. Now, Mr. Burlingame, I believe you testified that certain stock, property, stood in Mrs. Burlingame's name, against which certain stock in The Ellsworth Company of Arizona was issued. Now, whose property was this against which this Ellsworth stock was issued?

A. That was my property.

Q. Now, Mr. Burlingame, you have testified, I believe, that you received a subpœna to appear before the grand jury. Will you kindly look at this paper which I now show you and see if that is a copy of it?

A. I should say that was a copy.

Q. Now, I show you another paper, Mr. Burlingame, and ask you is that a copy of another subpœna served on you?

A. Yes; I should say so.

Q. When were they served on you, Mr. Burlingame?

173 A. I should say somewhere near the middle of December, 1911.

The Referee. Both of them served together, Mr. Burlingame?

The Witness. Yes.

Mr. Flannagan. Now, Mr. Referee, I would like to offer these in evidence.

(The papers referred to were received in evidence and marked "Respondent's Exhibits F and G" of this date.)

Q. Now, at the time that you had the first interview with Mr. Grant, that he testified to, was your attorney Judge Keener, of New York?

A. Judge Keener was one of my attorneys; yes.

Q. Do you know where he was at that time?

A. I was informed at his office that he was in Maine.

Q. Do you know when he returned to his office?

A. It was sometime early in October.

Q. Now, you have testified to certain conversations with Mr. Grant at various times in regard to these packages and boxes. Now, will you please explain those conversations chronologically and just exactly what was said?

A. On the day referred to, which was, I think, early in September, 1911——

Q. Now, confine yourself to the subject of opening this box, or these packages.

A. I went to Mr. Grant's office. You say I must confine myself to simply——

Q. What was said on that subject, on the subject of open-

174 ing the box or packages?

A. Well, you are limiting me.

Q. That is right.

Judge Keener. Anything relating to that subject.

Q. Anything relating to that subject only.

A. Well, I went to him for the purpose of consultation.

Q. Well, you have testified to that.

A. And said to him that I had some papers with me—well, I said I had some papers with me.

Q. What was said, if anything, about opening these packages?

A. I do not really understand the question.

Judge Keener. The question is this: What was said at that time about opening the package or that box, if anything was said.

The Referee. Now, you either said something about it or didn't say anything about it, or you don't know whether you did or not.

The Witness. Mr. Grant told me he was too busy to go into an extended conference or consultation, and said that whenever I could get around to it to come back, to let him know and then the papers

would be there, the packages would be there and that we could then go over them.

The REFEREE. But you never got around to it, did you?

The WITNESS. I haven't said that.

175 The REFEREE. No; but I ask you.

The WITNESS. Well, I got around, ready myself to go through or have a consultation and there wasn't time then, although there was some consultations, after some of the boxes or some of the packages had been opened.

Q. What time are you talking about now?

A. I am not talking about this first one, but I am replying to the referee.

Q. Now, then, is that all that was said on this first occasion on that subject?

A. Well, I cannot remember the exact language.

Q. Now, what was said——

Judge KEENAN. Give the substance of what was said at that time.

Q. Can you give the substance of anything more that was said at that time?

Judge KEENAN. Just give the substance of what was said at the first interview about the opening of the packages or box.

The WITNESS. This, as I understand it, is the day when the packages were delivered to Mr. Grant?

Judge KEENAN. Yes.

The WITNESS. Well, shall I repeat that?

The REFEREE. If you cannot add anything to it, don't repeat it. If you have already answered it as well as you can, say so.

176 The WITNESS. At that time there was reference made to a box which was to be sent to Mr. Grant's office which contained memoranda that I wanted to consult him about and that was included in this other remark that I made about when I could come back, and about giving him some notice so that we then would go over everything.

The REFEREE. Taking up the whole business, including what was there and what was to come?

The WITNESS. Yes; that was the purport of it; I cannot tell the exact words.

Q. Now, then, was there anything said on the same subject at any subsequent conversation you had with Mr. Grant?

A. Let me understand what the subject is.

Q. On the subject of opening these packages or box, or of not opening them, either way you want to put it?

A. I should say about the 1st of April, 1912, when I saw Mr. Grant at the rooms of the Bar Association, that I had a talk with Mr. Grant, and Mr. Grant said to me "Do you want me to open these bundle and box for the purpose of giving information to the Government or making any disclosures," and I said "I do not."

Q. Now, you testified a moment ago in answer to a question of the referee about some other conversation on another occasion; give us the substance of what was said on that occasion.

A. I should say that was about a month after the time the packages and boxes were left with Mr. Grant.

177 Q. When you refer to boxes, do you mean box or boxes?

A. Well, box, for the purpose of consulting with him. I opened one package and the box and refreshed my memory and then afterwards had a consultation with Mr. Grant.

Q. Now, you testified at the previous hearings quite at length, or at some length, on the subject of what was said to Mr. Grant about not opening these boxes or these packages. Do you want to qualify that by what you now say, or not, or do you care to say anything in qualification?

A. Why, I think I was confused by the questions or the way the questions were put to me, and I want what I have just said to stand.

Q. Confused as to what; as to what occurred, or the times they occurred, or what?

A. Well, times, and I did not thoroughly understand the questions. I suppose I might say I was rattled.

Q. Now, have you given to Mr. Grant at any time instructions not to open—specifically not to open these bundles or these boxes for any purpose except for the purpose of disclosing the contents or the whereabouts of the contents to the Government?

A. No.

Q. That is the extent to which you have forbidden Mr. Grant to open those boxes or packages?

A. Yes.

The REFEREE. Do I understand you that he has your authority to open them, provided he don't communicate the contents to the Government?

The WITNESS. Yes.

178 Q. Now, do you want to change your last answer or continue it in any way?

A. May I hear the last question and answer.

(Question and answer read.)

The WITNESS. Yes.

Q. Now, I show you this telegram here, respondent's Exhibit E; did you [illegible]?

A. Yes.

Q. What year was it, Mr. Burlingame?

Mr. STEPHENSON. There is no question about the year.

The WITNESS. 1912.

Cross-examination by Mr. STEPHENSON:

Q. Mr. Burlingame, you said you were rattled before. Well, are you rattled now?

A. I do not know, Mr. Stephenson.

Q. Then how do you know that what you are testifying to now is more nearly the truth than what you testified to before?

A. Well, I have had considerable time to reflect.

Q. And have you read your previous testimony before testifying this time?

A. Yes.

Q. Now, what was there confusing about the questions which were asked you at your previous examination?

A. I do not say that all the questions were confusing.

Q. Well, which ones were?

A. I cannot particularize.

179 Q. Now, at this second conference with Mr. Grant, the conference which occurred about a month after the first packages were delivered to him, how long a conference did you have?

A. Oh, I cannot tell you.

Q. About how long?

A. Perhaps half an hour.

Q. And how many papers did you look at to refresh your memory?

A. I cannot tell you.

Q. Did you look at more than one?

A. Yes.

Q. Two?

A. I will say several.

Q. Did you make any memoranda on a piece of paper or anything as to what you found in those papers?

A. I should say I did.

The REFEREE. That kind of an answer isn't a bit satisfactory. It may mean you don't remember whether you did or not.

The WITNESS. Yes; I did.

Q. Did you submit those memoranda to Mr. Grant?

A. No. If you mean by submit show them to him?

Q. Yes—show them to him.

A. No.

The REFEREE. You kept them yourself?

The WITNESS. Yes.

Q. Why didn't you show Mr. Grant the papers themselves?

Judge KEENER. I object to that, if your honor please.

The REFEREE. The fact is that he didn't. I should think that would be sufficient for you as far as that particular point is concerned.

180 Q. Now, did you put back in that package the paper or papers that you took out and looked at?

A. I decline to answer.

Q. On what ground?

A. On the ground that it might incriminate me.

Judge KEENER. I object to it as immaterial.

The REFEREE. He can answer that question whether he put them back.

The WITNESS. I put some of them back.

Q. And some you didn't put back?
A. I am very positive that I put them all back.
Q. Did you put any other papers in that box or package?
Judge KEENER. I object, if your honor please.
Mr. STEPHENSON. Well, Mr. Grant said he couldn't tell whether he put a paper in or not, but it isn't very material here I think, and I do not think I will urge it.
Q. Now, Mr. Burlingame, you have been living in New York, have you not, during all this period?
A. What period do you mean?
Q. During 1911 and 1912?
A. No; not all of the time.
Q. Well, in or near New York?
A. Yes.
Q. And you have from time to time consulted with Judge Keener, have you not?
A. Yes.
Q. You consulted him more frequently than you have Mr. Grant, have you not?
A. Yes.
181 Q. And you have consulted other attorneys in New York, have you not?
A. Yes.
Q. And you have consulted those more frequently than you consulted Mr. Grant?
A. No.
Q. But these other attorneys whom you consulted in New York you also consulted, did you not, regarding your defense?
A. Well, I have consulted other attorneys regarding my defense.
Q. In New York?
A. Yes.
Q. And didn't you consider it important to have those documents in New York so that you could refresh your memory when you were consulting these attorneys?
Judge KEENER. I object to that.
The REFEREE. That all speaks for itself, it seems to me. I think that is rather a matter of argument.
Mr. STEPHENSON. Well, perhaps it is.
Q. Now, Mr. Burlingame, after receiving these two subpœnas, Exhibits F and G, you appeared before the grand jury, did you not?
A. Yes.
Q. And you submitted a sworn statement before the grand jury?
A. Yes.
Mr. STEPHENSON. Now, I offer in evidence the statement—the sworn statement of Mr. Burlingame before the grand jury.
(Same received in evidence and marked "Exhibit No. ——.")

F
182 WALTER B. GRANT resumed the stand.

By Mr. FLANNAGAN:

Q. Mr. Grant, did Mr. Burlingame at any time order or direct you not to open these packages and this box except insofar as he directed you not to open them for the purpose of disclosing their contents to the Government?

A. No, sir; not except as I have testified at the Bar Association.

By Mr. STEPHENSON, cross-examination:

Q. Well, why didn't you open them?

A. I hadn't seen them before that.

Q. Why haven't you opened them during all this time they were in your office?

A. Well, I was always driven so, and he was going to come and go through them with me. I was waiting for the time when he came, and you are lawyer enough to know you do not borrow any trouble until you have to.

The REFEREE. But on what do you base the statement that the direction not to open them was a qualified prohibition not to open them——

The WITNESS. Do you mean in this matter?

The REFEREE. Yes; you presumed that was the reason why he gave directions, is that it?

The WITNESS. No, sir; I think Mr. Burlingame and Judge
183 Keener and I were together at the Bar Association before I saw Mr. Stephenson, after I came from El Paso, and I think that was just about the language that was used by Mr. Burlingame to me.

Q. That was after you were subpœnaed?

A. Yes.

The REFEREE. If you have got anything, don't give it to the Government?

The WITNESS. No; I was directed not to open them for the purpose of disclosing the contents or of producing them.

The REFEREE. Was the language for the purpose of disclosing them to the Government?

The WITNESS. Well, it must have been meant under that subpœna.

The REFEREE. What you are testifying to is what you consider the fair inference, the fair reason why you shouldn't.

The WITNESS. Yes; because the incident had arisen. I had wired that I was coming here to Judge Keener and then followed the same day, I think.

By Judge KEENER:

Q. Tell us as near as you can, Mr. Grant, this conversation between Mr. Burlingame and yourself as to the opening of those boxes or packages, the conversation that took place at the Bar Association?

A. I think it was about in this language: Mr. Burlingame
184 came there after I had met Judge Keener there and had been with him for some time, or else he was there and we were by

ourselves, and then we saw Mr. Burlingame, and I asked Mr. Burlingame what was his desire in regard to my opening these two packages and the box, and he said to me that he did not wish me to; that he directed me not to do so. I do not believe that there was much more than that said, and what I said beyond that, I think, was a matter of inference, as I look at it.

The REFEREE. Because you had been served with a subpœna?

The WITNESS. I had been served with a subpœna and I had wired Judge Keener I would come here. Mr. Burlingame met me at the station, and he would not talk about this case and I wouldn't, and I saw Judge Keener at the Bar Association rooms sometime later and looked up some law. I wanted to see what situation I was in; what my attitude was; and then this interview occurred with Mr. Burlingame downstairs in a little reception room near the office there.

By Mr. FLANNAGAN:

Q. Did you tell him that you expected to go before the grand jury the next day?

A. Yes; he knew it; I told him so.

The REFEREE. Did the question of your opening the package or box for any other purpose come up at all?

185 The WITNESS. No, sir; it did not.

Mr. FLANNAGAN. Now, Mr. Referee, we will have to ask for an adjournment for the purpose of producing the testimony of Messrs. Granger and Case to corroborate the statements made by Mr. Burlingame in regard to what he said to them on the subject of taking over the ownership of the books and papers of The Ellsworth Company and the assets.

The REFEREE. Where are those gentlemen now?

Mr. FLANNAGAN. Those gentlemen, or one of them—Granger is in Idaho and Case is in Iowa.

The REFEREE. Do you know whether they plan to come back to New York in the near future?

Mr. FLANNAGAN. I do not think they do. They were here sometime shortly past—one of them was here sometime shortly past, but we did not know it at the time. He was here in response to the direction of the Government.

Mr. STEPHENSON. Just what questions would you ask them—ask Mr. Granger, for instance?

Mr. FLANNAGAN. We would ask him whether the conversations which Mr. Burlingame stated occurred between himself and them actually occurred.

186 Mr. STEPHENSON. Can you refer to what pages of the minutes that is on?

Mr. FLANNAGAN. Page 81 for Mr. Granger and page 82 for Mr. Case.

Mr. STEPHENSON. Mr. Referee, this testimony on pages 81 and 82 is to this effect: Mr. Burlingame testified that between December and July, 1910, he told Orlby C. Granger that he wanted to turn

over to his corporation, the The American Trustee Company of New York, for safe-keeping, "such books and records that formerly had been used by The Ellsworth Company, which I had taken over as my property." It seems to me that the statement which Mr. Burlingame made to Mr. Granger at that time is irrelevant to this issue. I do not think any time should be expended in taking that testimony. Also Mr. Burlingame testified that he directed one of his employees, Mr. Case, saying to him that he had "asked Mr. Granger, the trustee of The American Trustee Company, to take charge of the books formerly used by The Ellsworth Company, which books belong to me," but he wished placed in the Trustee Company's hands for safe-keeping. That for a similar reason, I think, is irrelevant, the statement made by Mr. Burlingame to Mr. Case at that period.

The REFEREE. And the witnesses are out west and they are not expected to come back here in the near future. I do not think we should adjourn indefinitely for that.

187 Mr. FLANNAGAN. I do not ask an indefinite adjournment, but simply ask an adjournment so that we might examine them by commission.

Mr. STEPHENSON. I think that would be a very long and unsatisfactory way. The only satisfactory way to examine a witness in this case would be to examine and cross-examine him.

Judge KEENER. I understand your objection is as to the relevancy of their testimony?

Mr. STEPHENSON. That is the only objection that I could make, and that it is a self-serving declaration, and that it is hearsay, I may say, made at this period.

The REFEREE. That it is hearsay on the question of title?

Mr. STEPHENSON. Yes; in that Mr. Burlingame states it at this time.

The REFEREE. Well, I agree with you on that, and I will not grant the application for an adjournment.

Judge KEENER. For that reason?

The REFEREE. For that reason.

Mr. FLANNAGAN. By that reason your honor means that it is irrelevant and hearsay?

The REFEREE. Yes.

Mr. FLANNAGAN. We take an exception. Now, we have further testimony, Mr. Referee.

Mr. STEPHENSON. I have no further testimony.

The REFEREE. Then the hearing is closed, as I understand it.

Testimony closed.

188 RESPONDENT'S E. A.

NEW YORK, *Dec. 31, 1900.*

For value received I hereby assign to E. E. Burlingame all my right, title, and interest in one share of the capital stock of The Ellsworth Company, an Arizona corporation.

(Sgd.) MARGARET E. BURLINGAME.

189 (Copy.)

RESPONDENT'S EX. B.

NEW YORK, N. Y., *Dec. 31, 1909.*

For value received I hereby sell, assign, and deliver to E. E. Burlingame all my right, title, and interest in (1) one share of the capital stock of The Ellsworth Co.

(Sgd.) C. H. McINTYRE. [L. S.]

190 RESPONDENT'S EX. C.

C. H. McINTYRE, 49 EXCHANGE PLACE,
New York, Dec. 31, 1909.

Officers & Directors of The Ellsworth Co.

GENTS: I hereby tender my resignation as sec'y and director of The Ellsworth Company to take effect immediately.

Respt.

(Sgd.) C. H. McINTYRE.

191 RESP. EX. D.—April 27, 1912.—J. C. P.

BILL OF SALE—219.

Know all men by these presents, that The Ellsworth Company, a corporation organized under the laws of the Territory of Arizona, party of the first part, for and in consideration of the sum of one ($1.00) dollar and other valuable considerations, lawful money of the United States, to us in hand paid, at or before the ensealing and delivery of these presents, by The Ellsworth Corporation of New Jersey of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents do grant and convey, unto the said party of the second part, their executors, administrators, and assigns, office furniture, as per schedule hereto contained. To have and to hold the same unto the said party of the second part, their executors, administrators, and assigns forever. And they do, for their heirs, executors, and administrators, covenant and agree to and with the said party of the second part to warrant and defend the sale of the said furniture hereby sold unto the said party of the second part, their executors, administrators, and assigns against all and every person and persons whomsoever.

In witness whereof we have hereunto set our hands and seals the thirtieth day of December, in the year one thousand nine hundred and nine.

Signed, sealed, and delivered in the presence of—

THE ELLSWORTH COMPANY,
C. H. McINTYRE,
Secretary.

[Seal of Ellsworth Company.] [Corporate seal.] (1908.)
J. M. B.

SCHEDULE OF FOREGOING BILL OF SALE.

22 roll-top desk.	1 quartered oak flat table.
3 5' bookkeepers' desk.	2 4' " " "
1 6' " "	1 6' " " "
1 roll-top typewriter desk.	1 4½' " " "
4 flat-top desks.	2 3' " " "
3 " " typewriter desks.	16 typewriter tables.
2 double flat-top desks.	5 transfer cases.
27 desk chairs.	1 36 open section cabinet.
40 side chairs.	1 12-section desk "
17 typewriter chairs.	1 stationary "
1 " " (cane seat).	1 24-drawer index-card cabinet.
8 #4 Underwood machines.	1 6-drawer index-card cabinet.
3 #5 " "	1 2-drawer filing cabinet.
1 Burroughs adding "	11 filing cabinets.
1 protectograph.	1 4-drawer filing case.
1 addressograph machine and cabinet.	1 12 " " "
1 writerpress and type.	Furniture in The Ellsworth Company's offices at 49 Exchange Place.
3 phonographs.	Furniture in Newark office.
1 shaving machine for phonograph records.	" Boston "
2 Mosler safes.	" Milwaukee "
1 hat tree	" Buffalo "
10 rugs.	" Providence "
2 settees.	" Toledo "
1 12" electric fan.	" Philadelphia "
1 5-section bookcase.	" Albany "
1 bookcase.	" Room at 31 East 28th St., New York.
2 stools.	" (Mr. McLean).
2 swivel stools.	

192 (Certificate of register, reading as follows, attached:)

REGISTER'S OFFICE,

County of New York, State of New York:

I, Max S. Griefenhagen, register of the said county, have compared the annexed copy with an instrument filed in this office on the 4th day of January, A. D. 1910, at 10 o'clock 30 mins. a. m., as bill of sale numbered 708, and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

In testimony whereof I have hereunto subscribed my name and affixed my official seal this 27th day of April, 1912.

[SEAL.] (Sgd.) MAX S. GRIEFENHAGEN,
Register.

J. M. B.
P. J. G.

STATE OF NEW YORK,

County of New York, ss:

On this 30th day of December, in the year one thousand nine hundred and nine, before me personally came and appeared, C. H. McIntyre, who, being by me duly sworn, did say that he is the secretary of The Ellsworth Company, the corporation named in the foregoing instrument; that he resides in Brooklyn, New York; that he knows the corporate seal of said corporation; and that the seal affixed to said instrument is said corporate seal of said corporation; and that the said instrument was signed and sealed in behalf of said

corporation by order of the board of directors; and that deponent signed his name thereto by like order.

[NOTARIAL SEAL.] RICHARD E. NEMS,
Notary Public, Kings County.

(Certificate filed in New York County. Certificate filed in register's office, New York County, #1050.)

(Indorsed:) To certified copy. Bill of sale. Chattel #703. Filed Jan. 4, 1910. Charges paid. For Keener, H. & W. No. 22303.

193 RESPT'S EX. E.—May 6, 1912.—R. J. B.

NEW YORK, *March 18.*

WALTER B. GRANT,
Toltec Club, Elpaso.

Whether you have any information or whether you have any papers, or what they are, if you have any, are all alike privileged, and I shall not waive my privilege that you shall not communicate any fact to anybody.

(Sgd.) E. E. BURLINGAME.

194 RESPT. EX. F.—MAY 6, 1912.—R. J. P.

The President of the United States to Elmer E. Burlingame, Esq., president of The Ellsworth Company, Hotel Girard, 123 West 44th Street, New York, N. Y., greeting:

[SEAL.]

J. A. S.

We command you, that all business and excuses being laid aside, you produce or cause to be produced before the grand inquest of the body of the people of the United States of America for the Southern District of New York, at a circuit court to be held at the United States courthouse and post-office building, Borough of Manhattan, city of New York, on the 5th day of December, 1911, at two o'clock in the afternoon, in regard to an alleged violation of the statutes of the United States by James Dunlop Smith, the following:

General ledgers, journals, and cash books of The Ellsworth Company, an Arizona corporation, for the years 1907, 1908, and 1909;

All contracts between said Ellsworth Company and The Fiscal Agency Company of New York, made or executed during the years 1907, 1908, and 1909;

And for a failure to produce or cause to be produced the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness the Hon. Edward D. White, Chief Justice of the United States Supreme Court at the Borough of Manhattan, in the city of New York, on the 27th day of November, 1911.

JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
United States Attorney for
the Southern District of New York.

195 RESPONDENT'S EX. G.—MAY 6, 1912.—R. J. B.

The President of the United States of America to The Ellsworth Company (an Arizona corporation), greeting:

[SEAL.]

We command you, that all business and excuses being laid aside, you produce before the grand inquest of the body of the people of the United States of America for the Southern District of New York, at a circuit court to be held at the United States courthouse and post-office building, Borough of Manhattan, city of New York, on the thirteenth day of December, 1911, at two o'clock in the afternoon, in regard to an alleged violation of the statutes of the United States by James Dunlop Smith, the following:

General ledgers, journals, and cash books of The Ellsworth Company, an Arizona corporation, for the years 1907, 1908, and 1909;

And for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness, the Hon. Edward D. White, Chief Justice of the United States Supreme Court, at the Borough of Manhattan, in the city of New York, on the 11th day of December, 1911.

(Sgd.) JOHN A. SHIELDS, *Clerk.*

(Sgd.) HENRY A. WISE,
United States Attorney for
the Southern District of New York.

196 Govt. X 2.—April 27/12.—T. C. P., steno.

TERRITORY OF ARIZONA,
Office of the Territorial Auditor.

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, W. C. Foster, territorial auditor of Arizona, do hereby certify that the annexed is a true and complete transcript of the articles of incorporation of The Ellsworth Company, which were filed in this office on the eighth day of January, A. D. 1908, at two o'clock p. m., as provided by law.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the city of Phoenix, the capital, this 17th day of November, A. D. 1900.

W. C. FOSTER,
Territorial Auditor.

[Seal of the Territory of Arizona, Arizona Territory.]

197 *Articles of incorporation.*

Know all men by these presents, that we, the undersigned, have associated ourselves for the purpose of forming a corporation, under chapter 2 of title 13, Revised Statutes of Arizona, 1901, and acts amendatory thereof, hereby adopt the following articles of incorporation.

ARTICLE I.

The name of this corporation shall be The Ellsworth Company.

This company shall keep an office at Phoenix, Arizona, and may keep another principal office and place of business in New York City, State of New York, in which place or places all meetings of incorporators, stockholders, and directors may be held and all corporate business may be transacted.

198 ARTICLE II.

The capital stock of this corporation shall be $100,000, divided into 100,000 shares of the par value of one dollar ($1.00) each, which shall be paid for at such times and in such manner as the board of directors may designate. All or any portion of the capital stock may be issued in payment for stock or personal property, services, or any other right or thing of value, for the use and purposes of the corporation, and when so issued shall become and be fully paid, the same as though paid for in cash at par; and the directors shall be sole judges of the value of any property, right, or thing acquired in exchange for capital stock. No shares of capital stock shall be issued until fully paid for, and thereafter shall be nonassessable.

ARTICLE III.

The general nature of the business in which this corporation shall engage is as follows, to wit:

To do a general fiscal agency, investments, promotion, brokerage, theatrical, amusement, irrigation, power, transportation, manufacturing, and mining business, owning all necessary appliances, machinery, buildings, ships, boats, vehicles, etc., etc., acquiring, owning, operating, leasing, buying, and selling all kinds of real and personal property necessary to the carrying on of one or more of the afore-

said general lines of business; to own and vote shares of its own capital stock and of other corporations; to borrow and loan money; to issue bonds, notes, and other evidences of indebtedness and to secure the payment of the same by mortgage, deed of trust, or otherwise; engaging in any and all classes of business that a natural person might or could in the United States of North America, or in any other part of the world.

ARTICLE IV.

The affairs of this corporation shall be conducted by a board of directors and *and* such officers as the directors may elect or appoint. The directors, in number to be determined by the by-laws, shall be elected at the annual meeting of the stockholders on the third Wednesday of December of each year, as the by-laws shall provide. The directors shall have the power to adopt, amend, and rescind by-laws, to fill vacancies occurring in the board of directors from any cause, and to appoint from their own number an executive committee and vest said executive committee with all the powers granted the board of directors by these articles of incorporation. Until the first annual meeting of stockholders and until their successors have been elected and qualified, the following-named persons shall be the directors: E. E. Burlingame, M. E. Burlingame, C. H. McIntyre.

ARTICLE V.

The commencement of the corporation shall be the day these articles are filed in accordance with law, and the termination of the corporation shall be twenty-five years thereafter, with privilege of renewal, as provided by the statute.

ARTICLE VI.

The highest amount of liability to which this corporation shall subject itself at any one time shall not exceed $60,000.

ARTICLE VII.

The private property of the stockholders of this corporation shall be forever exempt from liability for debts or obligations.

In witness whereof we have hereunto set our hands and seals this 8th day of January, 1908.

VERNON W. EVANS. [SEAL.]
GEO. W. VAUGHN. [SEAL.]
B. S. TEASLEY. [SEAL.]

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, W. H. Teasley, a notary public in and for the Territory and county aforesaid, on this day personally appeared Vernon W.

Evans, Geo. W. Vaughn, and B. S. Teasley, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 8th day of January, A. D. 1908.

[NOTARIAL SEAL.] W. H. TEASLEY,
Notary Public.

My commission expires 14th day of December, A. D. 1911.

902 TERRITORY OF ARIZONA
County of Maricopa, ss:

I, C. F. Leonard, county recorder in and for the county and Territory aforesaid, hereby certify that I have compared the foregoing copy with the original articles of incorporation of The Ellsworth Company, filed and recorded in my office on the 8th day of Jany., 1908, in book No. of incorporations at page , and that the same is a full, true, and correct copy of such original and of the whole thereof.

Witness my hand and seal of office this 8th day of Jany., 1908.

[SEAL.] C. F. LEONARD,
County Recorder.

Filed in the office of the Territorial auditor of the Territory of Arizona this 8 day of January, A. D. 1908, at 2 p. m., at request of The Incorporating Company of Arizona, whose post office address is Phoenix, Arizona.

JOHN H. PACE,
Territorial Auditor.

(Made EE.)
(Compared EE. to A. J. S.)

903 Govt. Ex. #3.—Apl. 27/12.—J. C. P. Steno.

By-laws of The Ellsworth Company.

ARTICLE I.—STOCKHOLDERS.

1. Annual meetings:

A meeting of the stockholders shall be held annually at the office of the company in the city of New York, at eleven o'clock a. m., on the first Monday of January of each year for the purpose of electing directors and for the transaction of any other business that may come before it.

2. Notice:

Notice of the annual meeting shall be mailed to each stockholder at the address appearing on the records of the company, at least seven days prior to such meeting.

3. Organization:

The president, in his absence the vice president, and in the absence of both a chairman appointed by the stockholders present, shall call

meetings of stockholders to order and shall act as the chairman thereof.

The secretary of the company shall act as secretary of all meetings of the stockholders. In his absence the presiding officer may appoint any person to act as secretary.

4. Quorum:

A majority of the stock issued and outstanding represented by the holders thereof, either in person or by proxy appointed by an instrument in writing, shall be a quorum at all meetings of stockholders.

5. Adjournment:

If at any annual or special meeting a quorum fail to attend in person or by proxy, a majority in interest of stockholders attending such meeting in person or by proxy may, after the lapse of an hour, adjourn the meeting from time to time, without further notice, until a quorum shall attend and thereupon any business may be transacted which might have been transacted at the meeting as originally called, had the same been held.

6. Special annual meetings:

Whenever, from any cause, an annual meeting of stock-
204 holders be not held on the day provided, a special annual meeting may be called by the directors in the manner and at such place as is prescribed for the holding of annual meetings of stockholders, at which special annual meeting directors shall be elected in accordance with such provisions, and shall hold office until the first Monday in January next succeeding and until others are elected and have qualified in their stead.

7. Voting:

At all annual and special meetings of stockholders, every holder of stock issued to a bona fide purchaser of the same, represented by the holder thereof, either in person or by proxy in writing, shall have one vote for each share of stock so held and represented at such meeting. Voting for directors and upon demand of any stockholder upon any question at any meeting shall be by ballot.

8. Special meetings:

Special meetings of the stockholders for any purpose shall be held whenever called by the board of directors, either by writing instrument or by the vote of a majority, and shall be called whenever stockholders owning one-fourth of the capital stock issued and outstanding shall in writing make application therefor to the president, stating the object of such meeting.

9. Notice of special meetings:

Notice of each special meeting of stockholders, stating the time and in general terms the purpose or purposes thereof, shall be mailed to stockholders seven days prior to such meeting and in the same manner prescribed for giving notice of annual meetings.

10. Order of business:

The stockholders may determine the order of business at their meetings. If no order of business be designated, the following shall apply:

(1) Roll call. A quorum being present:
(2) Reading of minutes of preceding meeting and action thereon.
(3) Reports of officers.
(4) Reports of committees.
(5) Election of directors.
(6) Unfinished business.
(7) New business.

5. List of stockholders:

At each meeting of stockholders a full, true, and correct list, in alphabetical order, of all the stockholders entitled to vote at such meeting, with the number of shares held by each, certified to by the secretary, shall be furnished.

12. Inspectors:

905 At all meetings of stockholders the polls shall be opened and closed, the proxies shall be received and be taken in charge, all questions touching the qualifications of voters and the validity of proxies, and the acceptance or rejection of votes shall be decided, and all ballots shall be received and counted by two inspectors, who shall be appointed by the presiding officer of the meeting and who shall, in writing, certify to the returns.

Article II.—Board of Directors.

1. Number:

The business and affairs of the company shall be managed and controlled by a board of directors, who shall be stockholders of the company.

2. Term:

Each director shall serve for the term for which he shall have been elected and until his successor shall have been duly elected and qualified, provided he remain a stockholder of the company during such time.

3. First meeting:

Immediately after each annual election of directors the newly elected directors shall meet for the purpose of organization, the election of officers, and the transaction of other business.

4. Regular quarterly meetings:

Regular quarterly meetings of the board of directors shall be held at eleven o'clock a. m. on the first Monday of the months of January, April, July, and October of each year, if not a legal holiday, and if a legal holiday, then on the next succeeding business day. Notice need not be given of the regular quarterly meetings.

5. Special meetings:

Special meetings of the board shall be held whenever called by the president or secretary of the company or by one-third of the directors. Unless otherwise specified in the notice thereof, any and all business may be transacted at a special meeting.

6. Notice:

The secretary shall give notice to each director of each special meeting by mailing the same at least four days before the time of meeting, or by telegraphing or telephoning not less than two days prior to the time of meeting.

7. Place of meeting:

The directors shall hold their meetings and may have an
206 office and keep the books of the company at such place in the United States of America as the board from time to time may determine.

8. Quorum:

A majority of the board of directors at the time in office shall constitute a quorum for the transaction of business, but a majority of those present at the time and place of any regular or special meeting, although less than a quorum, may adjourn from time to time, without notice, until a quorum be had. The vote of the majority of the directors present at any meeting in favor of or against any proposition shall prevail as herein otherwise provided.

9. Order of business:

The board of directors may from time to time determine the order of business at their meeting. The usual order of business at such meetings is as follows:

(1) Roll call. A quorum being present:
(2) Reading of minutes of preceding meeting and action thereon.
(3) Reports of officers.
(4) Reports of committees.
(5) Unfinished business.
(6) Unfinished business.
(6) Miscellaneous business.
(7) New business.

10. Chairman:

At all meetings of the board of directors the president, or in his absence, the vice president, or in his absence, a chairman chosen by the directors present, shall preside.

11. Vacancies:

In case of any vacancy among the directors through death, resignation, disqualification, or other cause, the remaining directors, whether or not constituting a quorum, may by unanimous vote elect a successor to hold office for the unexpired term of the director whose place shall be vacant and until the election of and and acceptance by his successor.

207 12. Committees:

From time to time the board may appoint committees for any purpose or purposes, who shall have such powers as shall be specified in the resolution of appointment.

13. Compensation:

The directors and officers of the company and all members of committees shall serve without salary, except as may be determined by the vote of a majority of all the directors.

14. Action by resolution:

The board of directors shall have power to act in the following manner: A resolution in writing signed by all of the members of the board of directors shall be deemed to be action by such board to the effect therein expressed with the same force and effect as if the same had been duly passed by the same vote at a duly convened meeting, and it shall be the duty of the secretary of the company to record such resolution in the minute book of the company under its proper date.

15. Hypothecation of property:

The board of directors may mortgage or hypothecate all or any portion of the property of the company without having first procured the consent of the stockholders to such action, but they shall not dispose of all of the assets of the company until they are authorized to do so by the majority vote of the stockholders.

Article III.—Officers.

1. Executive:

The executive officers of the company shall be a president, a vice president, a secretary, and a treasurer, who shall be elected annually by the board. The secretary and treasurer may or may not be members of the board.

2. Powers:

The powers and duties of the treasurer may be exercised and performed by one of the officers.

3. Subordinates:

The board may appoint such other officers as it shall deem necessary, who shall have such authority and shall perform such duties as from time to time may be prescribed by the board.

4. Tenure of officers:

All officers and agents shall be subject to removal at any time, with or without cause, by the affirmative vote of a majority of the whole board.

5. President:

The president shall be the chief executive officer of the company. He shall preside at all meetings of the stockholders and of the board of directors. He shall sign and execute all authorized bonds, contracts, or other obligations in the name of the company, shall sign all certificates of stock of the company, and shall do and perform such other duties as may be assigned to him by the board.

6. Vice president:

In case of the absence or disability of the president, the duties of the officer shall be performed by the vice president.

7. Treasurer:

The treasurer shall have the custody of all the funds and securities of the company which may come into his hands; he shall endorse on behalf of the company, for collection, checks, notes and other

obligations, and shall deposit the same to the credit of the company in such bank or depositories as the board of directors may designate; he may sign receipts and vouchers for payments made to the company; and he shall sign checks made by the company and pay out and dispose of the same under the direction of the board; he shall sign with the president, or such other person or persons as may be designated by the board, all authorized promissory notes and bills of exchange of the company; whenever required by the board he shall render a statement of his cash accounts; he shall enter regularly in books of the company to be kept for that purpose full and accurate accounts of all moneys received and paid by him on account of the company; and he shall perform all duties incident to the position of treasurer, subject to the control of the board.

5. Secretary:

The secretary shall keep the minutes of all proceedings of the board of directors and the minutes of all meetings of the stockholders; he shall attend to the giving and serving of all notices for the company; he shall sign with the president in the name of the company all contracts authorized by the board, and shall affix the seal of the company thereto; he shall have charge of the certificate books and such other books and papers as the board may direct; he shall sign with the president or vice president certificates of stock, and he shall perform all duties incident to the office of secretary subject to the control of the board.

ARTICLE IV.—CAPITAL STOCK.

1. Certificates:

The certificates of shares of the stock of the company shall be in such form as shall be approved by the board of directors. The certificates shall be signed by the president or vice president and the secretary.

2. To be entered:

All certificates of stock shall be consecutively numbered, and
209 the names of the owners, the number of shares and the date of issue shall be entered in the company's books.

3. Certificates cancelled:

Except in cases where certificates are lost or destroyed, and in that case after the receipt of satisfactory bond, unless the giving of a bond be waived by the board, no new certificate shall be issued until the former certificate for the shares represented thereby shall have been surrendered and cancelled.

4. Transfer:

Shares shall be transferred only on the books of the company by the holder thereof in person or by his attorney, upon the surrender and cancellation of certificates for a like number of shares.

5. Regulations:

The board may make such rules and regulations as it may deem expedient concerning the issue, transfer, and registration of certificates of stock of the company.

6. Dividends:

The board of directors may from time to time declare dividends upon the capital stock from the surplus or net profits of the company, and subject to the provisions of the articles of incorporation may fix and change the dates for the declaration and payment of dividends.

ARTICLE V.—SEAL.

1. Design:

The board shall provide a suitable seal containing the name of the company and the words "The Ellworth Company" which seal shall be in charge of the secretary to be used as directed by the board.

ARTICLE VI.—WAIVER OF NOTICE.

Any stockholder, director, or officer may waive any notice required to be given by these by-laws.

ARTICLE VII.

The words "board" and "directors" occurring in these by-laws mean "board of directors."

310 Gov't. Ex. 4.—May 7/12.—E. H. C.

Ex. A.—Dec. 18, 1911.

United States of America, Southern District of New York.

IN THE MATTER OF THE INQUIRY PENDING BEFORE THE GRAND INQUEST OF THE BODY OF THE PEOPLE OF THE UNITED STATES OF AMERICA, FOR THE SOUTHERN DISTRICT OF NEW YORK, IN REGARD TO AN ALLEGED VIOLATION OF THE STATUTES OF THE UNITED STATES BY JAMES DUNLAP SMITH.

STATE OF NEW YORK, *County of New York, ss:*

ELMER E. BURLINGAME, being duly sworn, says:

I am the person who has been served with certain subpoenas of which the annexed are copies.

I appear before your honorable body because of and by virtue of said subpoenas which direct me to produce before you certain books of The Ellsworth Company. Neither the said books nor any of them are in my possession, individually or as president of said company, nor are said books in the possession of the company, nor is deponent able to state that said books are in existence.

The Ellsworth Company was a mere formal corporation, and was in reality and substance merely the undersigned doing business under the name of The Ellsworth Company in matter where the name of that company appeared as the party acting, though the deponent

was also engaged in business under his own name, quite apart from The Ellsworth Company.

211 There was at one time two other stockholders of The Ellsworth Company who were directors, and one of them was secretary, but neither of them had any beneficial interest, the entire beneficial interest being in deponent, and it being so understood by said stockholders.

Deponent at all times held all of the stock of said Ellsworth Company, except two shares which were held by said two stockholders, one share each, the capital stock of said company being represented by one hundred thousand shares of the par value of one dollar each.

The said Ellsworth Company was never engaged at any time in interstate commerce, being engaged only in the sale of stock.

The said Ellsworth Company was in form a corporation of the State of Arizona. It never obtained any license or qualification to do business in the State of New York, and never complied with section 15 of the general corporation law of that State.

In July, 1909, the said Ellsworth Company began to liquidate, and by the 31st day of December, 1909, the liquidation of the company was completed and all business of any description whatsoever had ceased, and since that time the company has had no business whatever.

The books of the company were at that time closed, and no further entries thereon have since been made.

Said abandonment was with the intention and determination never to resume business.

The business which was carried on by The Ellsworth Company before its abandonment was taken up and carried on by another corporation, to wit, The Ellsworth Corporation of New Jersey, The Ellsworth Corporation being a corporation organized under the laws of the State of New Jersey.

212 For the purpose of convenience and to prevent confusion and of winding up certain contracts then outstanding in the name of The Ellsworth Company, which contracts were performed by The Ellsworth Corporation of New Jersey and the proceeds arising therefrom received by it, certain western agents continued to use the name of The Ellsworth Company, but the use of the name even for this purpose had substantially ceased in February, 1910, and had entirely ceased in June, 1910.

On December 31st, 1909, the two directors above mentioned of the company surrendered their stock to deponent, and thereby ceased to be directors and never thereafter acted as such, and abandoned whatever offices they may have held. Neither of said two stockholders ever held a certificate of stock, none having been issued to them.

At the time of the surrender of the interest of these two stockholders and of their surrender of their relations with the company as aforesaid the same was with the understanding previously had with them that all of the property standing in the name of said

company, or held by it, should be immediately turned over to deponent to be taken by him as his own personal, individual, and private property.

At that time all of the debts of the company had been paid and the stock of the other two stockholders having been surrendered to deponent on said understanding, he became the absolute owner of its property assets and books, including the books described in said subpœnas herein before referred to, said books were then transferred and turned over as aforesaid to deponent as his in-
213 dividual, personal, and private property, and received by him as such. Deponent has never since transferred to any other person, firm, or corporation any interest in said books or any of them, and the said Ellsworth Company has ever since remained without any assets or property whatever.

At the time deponent secured the ownership and possession of the said books as aforesaid no prosecution was anticipated or expected by deponent, nor had such a possibility been present in deponent's mind, and deponent did not acquire said property for the purpose of evading any subpœna or other illegal process, and deponent did not acquire said property for any illegal purpose. But deponent did acquire said books in the course of and upon the abandonment and dissolution of said company as aforesaid. The said Ellsworth Company was organized in the year 1908, but no meetings were, to the best of deponent's recollection, held after the organization meeting, either of the corporation or of its directors.

The said two stockholders other than deponent were named as directors in the charter of the company, but neither of them signed the charter, the same not being necessary under the laws of Arizona.

The books of said Ellsworth Company have never at any time been in deponent's possession as president of The Ellsworth Company.

Deponent has already been indicted by the grand inquest of the body of the people of the United States of America for the southern district of New York in the case of United States against
214 Burlingame and Cove, and said case is now pending against deponent.

There is no proceeding pending before your honorable body against The Ellsworth Company, the proceeding in which the said subpœnas were issued being one against James Dunlop Smith, who was never an officer of nor in any way connected with The Ellsworth Company.

Furthermore, the said books of said Ellsworth Company are not in the possession of the deponent, nor in the possession of The Ellsworth Company, and are not, to the best of his knowledge, information, and belief, in the State of New York, or in the southern district of New York, and the same were not in the possession of deponent, nor in the possession of said company, or to the best of his knowledge, information, and belief, in the State of New York, or in the southern district of New York, at the time the said subpœnas were served upon deponent, or the said proceedings begun against

the said James Dunlop Smith, or for a long time prior to said Smith's arrest.

Deponent respectfully declines to endeavor to obtain possession of said premises said books on the ground that they might tend to incriminate him.

In so doing, the deponent is acting in good faith, without intending any disrespect to his honorable body or to the court, and without any intention on his part to obstruct or in any manner interfere with the due administration of justice and solely for the purpose of protecting his legal rights in the premises, under the Constitution and laws of the United States of America.

ELMER E. BURLINGAME.

Subscribed and sworn to before me this 18th day of December, 1911.

[NOTARY'S SEAL.] DAISY V. MONAHAN,
Notary Public, Kings Co.

Cert. filed in N. Y. Co., #75.

215 (Indorsed:) U. S. District Court. Jun. 25, 1912. S. D. of N. Y.

216 EXHIBIT B.

United States District Court, Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

REFEREE'S REPORT.

To the honorable the judges of the District Court of the United States for the Southern District of New York.

I, Edwards H. Childs, referee, to whom by an order of this court, dated March 28th, 1912, and filed herein on April 8th, 1912, it was referred "to take evidence as to the rights and privileges claimed" by the above-named Walter B. Grant and "as to the title and ownership" of certain books and papers called for by a certain subpoena theretofore served upon said Grant "and to take such other evidence as may be relevant to the questions raised" in the proceedings set forth in said order and to report such evidence with my conclusions thereon, do hereby respectfully report as follows:

The said reference was duly brought on for hearing before me on April 23rd, 1912, a number of hearings were had, and I was attended by attorneys and counsel as follows: By Mr. Robert Stephenson and Mr. Raymond G. Brown, for the United States, and by Hon. William A. Kerner and Mr. Dallas Flannagan for Walter B. Grant, the respondent.

I proceeded to take the evidence submitted by the parties and to hear arguments thereon, and upon the evidence so taken I find and report as follows:

217 On March 13th, 1912, at El Paso, Texas, a subpœna duces tecum was duly served on the respondent, directing him to appear before a grand jury in the Southern District of New York to give evidence in regard to an alleged violation of the Statutes of the United States by J. D. Smith, and to produce the following books and papers:

"Ledgers, journals, and cash books of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received and copies of letters and telegrams sent by said company during the years 1907, 1908, and 1909." (s. m. p. 14, 15.)

The respondent obeyed the subpœna to the extent of appearing before the grand jury, but he did not produce the books and papers. He was sworn, testified that he was the attorney for one Elmer E. Burlingame, and then refused to answer certain questions put to him upon the ground of privilege. He was then presented to the court for contempt, when counsel representing Mr. Burlingame appeared and contended that the books and papers called for by the subpœna were the personal property of Mr. Burlingame rather than the property of The Ellsworth Company, and that a disclosure of their contents or their whereabouts would tend to incriminate him. This reference was thereupon ordered.

The respondent was admitted to the bar of the Supreme Court of the District of Columbia in 1885 and to the bar of the Supreme Court of the United States in 1889. In 1891 he was admitted to the Massachusetts bar and is now engaged in the general practice of law, with offices at No. 18 Tremont Street and No. 131 State Street in the city of Boston in that State. He is not a member of the New York bar or of the bar of this court.

218 Elmer E. Burlingame was indicted by a grand jury in the Southern District of New York on August 30th, 1911, "in connection with one Cove" and again on March 15th, 1912, "in connection with The Ellsworth Company, James D. Smith and others" (s. m. 1) and the respondent is one of the attorneys engaged in Mr. Burlingame's defence.

Sometime in September, 1911, after the first indictment had been found, Mr. Burlingame took two certain packages to the office of the respondent in Boston and, in addition thereto, caused a box "two and a half or three feet long and about eighteen inches the other two dimensions" (s. m. 6) to be sent there, the respondent agreeing to receive them, and that box, together with the two packages, are now in the respondent's State Street office. The respondent testified that he had searched for the books and papers called for by the subpœna except that he had not looked in the box or the two packages that he had received from Mr. Burlingame and that unless they were contained in the box or packages he was without power to

produce them (s. m. 173). He said he had not opened the box or the packages and had no actual knowledge of what they contained, but that they had been received by him, as attorney, for the purpose of consultation with his client, and were therefore privileged in his hands. Mr. Burlingame, the client, testified that he would not permit the respondent to open the box or the packages for the purpose of disclosing their contents to the Government and would not permit him to produce any of the books and papers called for by the subpœna, if he had them, and gave as his reason that they might tend to incriminate him.

It is apparently conceded that the respondent should not be required to open the box and packages in his office and look there
210 for the books and papers in question unless he would be obliged to produce them, if found, and the questions of privilege must be determined without knowing whether the respondent has power to produce.

I.

The first question is whether the client himself would be obliged to produce them, for if they would not be privileged in his hands they would not be in the hands of his attorney. If a book is available as evidence in the hands of the owner he certainly cannot make it unavailable by leaving it in his lawyer's office (Jones v. Reilly, 174 N. Y., 95, 105) and, on the other hand, if it is privileged in the hands of the owner because it might incriminate him he should be permitted to use it in consultation with his lawyer and to leave it with his lawyer to be examined, in order to enable the lawyer to properly advise, without forfeiting the privilege (4 Wigmore on Evidence, §2307). The subpœna in question called for certain books and papers "of The Ellsworth Company," a corporation, and it is contended on behalf of the Government, on the authority of Wilson v. United States, 221 U. S., 361, that there can be no claim of privilege with respect to corporate books. Mr. Burlingame contends, however, that while the books and papers are described as belonging to The Ellsworth Company they had become his private property prior to the time the subpœna was served, that they belonged to him personally, and that the doctrine of the Wilson case, therefore, does not apply. He concedes that the books and papers were at one time those of The Ellsworth Company, of which he was president, and that the books were kept by the company, but testifies that he was
220 the sole stockholder of the company, that he closed its affairs and ceased to do business in its name on December 31, 1909, that he then took what property the company had, including its books, and that from and after that day the title to the property, including the books, was in him personally. It will be well to consider, first, just what the doctrine of the Wilson case is upon which the Government relies, and, second, to consider the merits of Mr.

Burlingame's contention that it does not apply to the case under consideration.

The Wilson case, so far as it relates to the case at bar, is as follows: A subpœna duces tecum was issued directed to a corporation of which Wilson was president and calling for the production before a grand jury of certain letter press copy books of the company containing copies of letters and telegrams signed or purporting to be signed by the president. The subpœna stated that the books were called for "in regard to an alleged violation of the Statutes of the United States by C. C. Wilson." Wilson had already been indicted by the same grand jury and the subpœna in question had been issued in the course of its further investigations. The subpœna was served upon Wilson, as president, as well as upon certain other officers of the company, and on the return day Wilson appeared and was sworn. He stated that the letter press copy books in question were kept in his office as president of the company, were regularly used by him, and that they were in his "possession, custody, and control" as against any other officer or employee of the company. He had the books with him but declined to deliver them to the grand jury, claiming that they were essential to the preparation of his defence and that "he believed the matters therein contained would tend to
221 incriminate him" personally. The board of directors of the company passed a resolution demanding that Mr. Wilson deliver the books for production before the grand jury, but he refused to do so. The circuit court adjudged Mr. Wilson to be in contempt and the Supreme Court affirmed the judgment. Mr. Justice Hughes, writing the opinion of the court, said at p. 377:

"The appellant asserts his privilege against self-crimination. There is no question, of course, of oral testimony, for he was not required to give any. Undoubtedly it also protected him against the compulsory production of his private books and papers. Boyd v. United States, supra; Bollman v. Fagin, 200 U. S., 195. But did it extend to the corporate books?"

And further, after referring to the law with respect to public records and official documents, he said at p. 382:

"What then is the status of the books and papers of a corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circum-

abuses of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress."

And further, on pp. 384 and 385:

"The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violation of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in
382 its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without due regard to the conduct of the custodian."

In Dreier v. United States, 221 U. S., 394, a subpoena duces tecum (containing also the ad testificandum clause) was issued directed to Dreier and calling for certain books and papers of a corporation of which Dreier was secretary. Dreier was the custodian of the books and papers and the subpoena was served upon him. He refused to produce on the ground that the contents of the books and papers would tend to incriminate him, and he was thereupon committed for contempt. The judgment was affirmed on the authority of the Wilson case, the court saying, at p. 400:

"Dreier was not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process."

It follows then that if the books and papers of The Ellsworth Company were in the possession or control of Mr. Burlingame he could not refuse to produce them on the ground that the contents thereof would tend to incriminate him and it remains to consider the force of his contention that they now belong to him and that, for that reason he could refuse.

H.

It is to be noted that this same contention was made some months before, when the Government attempted to get these same books (but not the letters and telegrams) (s. m. 25) from Mr. Burlingame by means of two subpœnas issued in the same proceeding. One of the subpœnas was directed to The Ellsworth Company and the other to Mr. Burlingame, president, and both were served in December, 1911 (respondent's Exhibits "F" and "G," s. m. 182). Mr. Burlingame appeared before the grand jury in response to the subpœnas on December 13th, 1911, and filed an affidavit sworn to on that day, stating that the books were his private property but were not in his possession or in the southern district of New York and declining to endeavor to obtain possession and produce them on the ground that they might tend to incriminate him (Government's Exhibit 4, s. m. 191). It does not appear that anything further was done until March, 1912, when the subpœna now under consideration was served on the respondent. The books and papers called for are those used by the corporation in "the years 1907, 1908, and 1909," but the corporation was not organized until January, 1908, and we must accordingly eliminate the year 1907. The claim is that the books and papers of the corporation became the property of Mr. Burlingame on December 31st, 1909, and were his on March 13th, 1912, when the subpœna in question was served on the respondent. Assuming that the claim with respect to change of ownership is well founded it is nevertheless true that there was no change in the character of the books and papers themselves. They contained records of the corporation and were thus corporate rather than private records. We are not concerned with any entries or papers that were not, when made, those of the corporation itself. The [illegible] character of those entries and papers became fixed as corporate the moment they were made and could not be changed to private by any subsequent transfer to a private individual. It is contended on behalf of Mr. Burlingame, however, that the character of the papers is not the test; that the question is rather one of legal title; that the legal title to the books and papers called for is in him personally, and that consequently they are his private books and papers and would be privileged in his hands regardless of their character. I concede, of course, that a protection guaranteed by the Constitution should not be limited by a narrow or technical construction, but I think the provision of the fifth amendment that no person shall be compelled to be a witness against himself in a criminal case is fully observed so far as books and papers in his possession or control are concerned when he is not compelled to produce those that are personal and private in character, and that the character of books rather than the question of the legal title thereto is the true test. If the title to books of an existing corporation can be transferred to an individual and the books thereby put beyond the reach of the State

and the United States, in cases where the corporate entries therein would tend to incriminate the individual having title, the usefulness of the Wilson case will be largely impaired. If it should be held that title to such books can not be transferred it could easily be arranged so that the corporation would never get title. An officer could buy a book with his own money and thereby acquire the title beyond any question. He could then, with the consent of the directors, permit his book to be used by the corporation on the
225 express condition that title be retained in him personally.

It would probably be wrong for the directors to consent to such an arrangement, but that would not affect the question of title to the books. The officer in question could himself make corporate entries in the book, lock it up in his desk, and, if Mr. Burlingame's contention is well founded, could refuse to produce it if he could state that the corporate entries therein would tend to incriminate him. I think the Government is entitled to have the entries that constitute the records of the corporation, that are really corporate entries, regardless of who has the legal title to the book in which they are contained, and that, while a book itself may well be the subject of private property, that there can be no private property in corporate entries. The entries are the evidence and a private individual should not be allowed to withhold them when they are in his books any more than he should be allowed to withhold a book of the corporation when it is locked up in his trunk.

It is contended on behalf of the Government that the nature of corporate books is such that for reasons of public policy the title thereto cannot be transferred to a private individual, but in the absence of any statute, I am unable to so hold in the case of a purely private business corporation. I think that upon the dissolution of such a corporation the trustees would have title to its books as well as its other property and could ultimately pass the title. At the same time, I think that when a private individual acquires title to a corporate book it must be held subject to the right of the State and the right of the National Government, in cases within its jurisdiction, to the corporate records that may be contained therein
226 and to the book itself to the extent necessary to procure those records. It must be conceded, however, that this proposition was not necessarily involved in the Wilson case, because in that case there was no question with respect to title and, as a matter of fact, title was in the corporation. The Government did not urge the point before me, but relied mainly on its contention that the legal title had not passed out of the corporation. On behalf of Mr. Burlingame it was urged that the Wilson case stands for the proposition that the production of corporate books cannot be compelled unless the title thereto is in the corporation, and certain statements in the prevailing and dissenting opinions are cited in support of that contention. Mr. Justice Hughes, who wrote the prevailing opinion, said at page 380:

"But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held."

And Mr. Justice McKenna, who dissented, said at page 383:

"Whenever a privilege is claimed against the production of books or, of course, other property, may an issue be raised as to title and upon its decision by the court the right to the privilege be determined, or shall the rule only be applied when such issue is not made?"

It is quite true that the case is not authority for the proposition that it would have made no difference if the title to the corporate letter books had been transferred to Wilson, because the title had not been transferred, but, as I read the prevailing opinion, the reasons given therein would seem to apply with equal force to a case where title had passed and to reduce to the proposition that the real test is the character of the evidence sought. For this reason and for the reasons given above I find that the corporate books
227 and papers called for by the subpœna that was served on the respondent would not be privileged in the hands of Mr. Burlingame, even though he had subsequently acquired title thereto from the corporation.

III.

It remains, however, to determine the question of "title and ownership" as directed by the order of reference. The Ellsworth Company was organized under the laws of the Territory of Arizona on January 8th, 1908 (see charter of the company, Government's Exhibit 2 of April 27th, 1912), by Mr. Burlingame, who was the only person beneficially interested therein (s. m. 19), and who for some months prior to that time had been carrying on a part of his own business under the name of The Ellsworth Company (s. m. 27). The capital stock of the company was $100,000, divided into 100,000 shares of the par value of $1.00 each. Mr. Burlingame paid for three shares in cash, and the balance of the total capital stock was issued for property (s. m. 64, 73) which belonged to Mr. Burlingame, although some of it stood in the name of his wife. Mr. Burlingame testified that the stock not paid for in cash was paid for "by certain property of various kinds, some stock, some mining claims, and I think some furniture" (s. m. 31). There were three directors, and Mr. Burlingame, his wife, and Mr. C. H. McIntyre were named in the charter as the directors for the first year. An organization meeting was held about a week after the date of the charter (s. m. 30), but no other meetings were ever held. No meeting of the directors was ever held (s. m. 33). No certificates of stock were ever issued, but an entry was made on the books showing that one share was in the name of Mrs. Burlingame, one in the name of Mr. McIntyre,
228 and the balance in the name of Mr. Burlingame. Mr. McIntyre and Mrs. Burlingame were made stockholders in order to

quality them to be directors, but Mr. Burlingame was the beneficial owner of their shares and of the entire capital stock. Mr. Burlingame was president and treasurer (s. m. 47), and Mr. McIntyre was secretary. The books and papers called for by the subpoena served on the respondent were kept by the company from a time shortly after its incorporation in January, 1908, until December 31st, 1909, under the direction of the secretary (s. m. 48). The company maintained an office at No. 49 Exchange Place, in New York City, and was engaged in the business of "selling stock of several wireless companies" to the public (s. m. 57). In about July, 1909, Mr. Burlingame decided that the business of The Ellsworth Company should be discontinued, and the business of the corporation was actually closed at the end of that year. Nothing was done in the name of the company after December 31st, 1909, except that in March, 1910, a report was filed with the collector of internal revenue covering the year 1909 (s. m. 20). Mr. Burlingame testified that he desired to close the company on that day "in the face of that internal-revenue act" (s. m. 53), but it could not have been because of that act, for he organized other corporations by means of which to carry on his business (s. m. 48). The plan to discontinue the business of The Ellsworth Company was first thought of when the company failed to obtain permission to do business in New York on the ground that there was another corporation in that State with the same name. The business of Mr. Burlingame's company was growing larger, and the two companies found themselves getting each others mail (s. m. 54). Then, too, Mr. Burlingame found that "the name of The Ellsworth Company was not in good odor in the West," and he thought "the thing to do was to absolutely close it out" (s. m. 56). At about the time this decision was made (s. m. 48) Mr. Burlingame organized The Ellsworth Corporation under the laws of the State of New York for the purpose, originally, of taking over the business of The Ellsworth Company (the Arizona corporation to be closed out), but because of the New York law imposing a tax on transfers of stock he organized The Ellsworth Corporation under the laws of the State of New Jersey (s. m. 55) and proceeded to carry on business under the name of that corporation. He owned or controlled all of the stock in both the New York and New Jersey corporations (s. m. 50). The New York company occupied the office of the original Arizona company in New York City, which was also the "habitation of a number of other businesses" (s. m. 57, see also 51), while the New Jersey company had its offices in that State (52, 53). The office furniture of The Ellsworth Company of Arizona was transferred to The Ellsworth Corporation of New Jersey by a formal bill of sale dated December 30th, 1909 (s. m. 64, 65, and respondent's Exhibit D), and that company actually took up and carried on a part of the business that had previously been carried on by The Ellsworth Company of Arizona (s. m. 66). The wireless business was "coming into disrepute," and the New Jersey corporation "took on the selling of stock of a number of other enterprises that were not in any way con-

any one should make a claim against The Ellsworth Company, and again that he took title to the books because he "wanted them" (s. m. 85). He declined to give any further reason for taking title upon the ground that it would divulge the contents of the books and might incriminate him (s. m. 85, 86). It is obvious that all the reasons given would apply with equal force if he had not intended to take the title and had simply intended to keep the books for the purpose of protecting himself as the sole stockholder of a company with no property. His position was such that he had a perfect right to the possession of the books, even though title remained in the corporation, and he has given no reason why title should be in him rather than in the corporation, except that the contents of the books might tend to incriminate him. The question whether he actually obtained title, however, is a different one, and depends on the legal effect of the facts that have been set forth. That
222 there was no other individual who had a right to the books as against him is, of course, clear, and having abandoned the business of the corporation it is quite natural that he should treat the books as his own. At the same time it does not follow that he had the title. The corporation had not and has not now been dissolved and it still exists as a separate legal entity subject to the jurisdiction of the State. No steps were taken toward a dissolution of the company as distinguished from the mere ceasing to do business, and under the laws of Arizona, under which the company was organized, it could not be dissolved except by judicial proceedings (R. S. of Territory of Arizona, §28). No corporate action was taken, no formal transfer to Mr. Burlingame was made, and, while the title to personal property will, of course, pass on delivery, in view of the nature of the property in question and Mr. Burlingame's position in relation to the corporation, I find no affirmative act upon his part sufficient to take the title out of the company and put it in him. He was undoubtedly in a position to transfer the property of the corporation to a third party and give a good title, either directly from the corporation or by estoppel as against the corporation, according to the circumstances of the transaction, but the title would not come from him. If title to the corporate records passed to him on December 31st, 1909, it must have been by virtue of a mental act on his part; that is, a decision by him that he would assume title, or, as he put it, his "general intuition" (s. m. 88) that they should be kept and be his, and that, I think, is wholly insufficient. The corporation would not be estopped as against him, and, moreover, it is difficult to believe that he (a layman) would at that time have determined in his own mind that he had title as distinguished
223 from rightful possession and control as the sole officer, director, and stockholder of the company. It might as well be said that the corporate books were his prior to December 31st, 1909, because he was the company; that we should look behind the corporate entity and see that the so-called corporate business was really Mr. Burlingame's private business, just as it had been when he was

calling himself The Ellsworth Company, as he did for some months prior to the time the corporation was actually formed. It is not contended that this could be done, and the reasons given for the decision in the Wilson case apply to a one-man business corporation as well as to any other. It is the use of the corporate form, the existence of a corporation, that makes the difference, and the number of stockholders is immaterial.

For the reasons above stated, I find that at the time the subpœna in question was served on the respondent the legal title to the books and papers was and now is in The Ellsworth Company, the Arizona corporation.

(See Humphreys v. McKissock, 140 U. S., 304, at page 312, and De La Vergne Co. v. German Savings Institute, 175 U. S., 40, at page 53, on necessity of corporate action to transfer corporate property.)

IV.

A further question upon which the parties are at issue is whether the box and packages were received by the respondent as attorney for the purpose of consultation or were received by him simply for safe keeping, and the testimony of the respondent, of Mr. Burlingame, and of one James R. McLean must be considered in
234 determining this question. The respondent, having testified at the first hearing that he had not looked for the books and papers called for by the subpœna in the box and packages he had received from Mr. Burlingame, volunteered the following statement: "I might state here also, that I did not have the right under the circumstances under which this box or parcels were delivered to me, that I haven't undertaken to open them and would not without the consent of my client, and he has directed me that I have no power to do so—my client, Elmer E. Burlingame" (s. m. 17). In regard to how he came to receive the box and packages he said that some time late in August or early in September, 1911, Mr. Burlingame came to his Tremont Street office in Boston, that he brought with him the two packages in question (s. m. 168), and said he wished to consult him in regard to them, that he (the respondent) was too busy to take the matter up then, that Mr. Burlingame said he would like to leave the packages (s. m. 170), that they took them to his State Street office, where they "could work on the matter more undisturbed," and when there the respondent told Mr. Burlingame to give him a day or two notice when he wished "to go into this matter" (s. m. 163, 164). Mr. Burlingame told him there was a box that he wanted to send him in connection with the matter and said, "Will that be all right," and the respondent said, "All right, send it" (s. m. 168). Later on the same day the box was received (s. m. 6), addressed to the respondent at his State Street office. The box and packages have been there ever since but have not been used in any consultation, and the respondent doesn't know what they contain (s. m. 170). He testified, at the last hearing, that about a month

after he had received the box and packages Mr. Burlingame called and had a long interview with him, and that either the
235 day before the interview, or prior to the interview on the same day, Mr. Burlingame came to him and said he wanted to open one of the packages (s. m. 178); that he went with him to the State Street office, and that while he did not see the package opened he is sure it was opened; that he has a mental picture (s. m. 180) of seeing a paper in Mr. Burlingame's hands, but he is not sure whether he took it out of the package or out of his pocket (s. m. 181). The paper was not shown to the respondent, was not used at the interview, and the package is in the same condition as when it was received. He testified, also, at the last hearing, that he had an interview with Mr. Burlingame at the Bar Association in New York City in about April, 1912, after the subpœna had been served, and that Mr. Burlingame instructed him "not to open the box or two packages for the purpose of producing them in court or for the purpose of disclosing what the contents were" (s. m. 166); that he did not remember that anything was said in regard to opening them at the time they were delivered (s. m. 164, 167); that he was not forbidden to open them, except at the interview at the Bar Association (s. m. 193); that the qualification he had put on the prohibition, that it was against opening them for the purpose of production in court or disclosure, was stated by Mr. Burlingame (s. m. 193), and later that the qualification was simply a matter of inference on his part; and that Mr. Burlingame had done no more than direct him not to open them, although the question of opening them for any purpose other than that under consideration after the subpœna was served did not come up (s. m. 194).

At the first hearing Mr. Burlingame testified that he had
236 notified the respondent not to open the box or packages (s. m. 24); he gave the same testimony at the second hearing and said that at the time he delivered the packages to the respondent he told him they were to be used in his defence "and that when we got ready and the time came that we were ready to consider the questions and go over them that we would open them and I wished that they would not be opened until then—or it was language to that effect" and that he considered he had forbidden the respondent to open them at that time (s. m. 67, 68). He also said that at a later date he had repeated the direction not to open that he gave first in September, 1911, when the box and packages were delivered to the respondent (s. m. 69) and gave as a reason for the direction that he wanted them left "as they were so that when we did get to them they would be in the order in which I knew they were" (s. m. 70). Subsequently, however, at the last hearing and after the question with respect to the capacity in which the respondent held the box and packages had been discussed, he said he had been confused when he had testified, as above, and in describing again what took place when he left the packages with the respondent he omitted any reference to having forbidden him to open them,

although he had been quite positive about it at the previous hearings. He then said that his direction not to open them was given in April, 1912, at the meeting held at the Bar Association in response to a question asked by the respondent (s. m. 186) and he wished that to stand as his answer (s. m. 187). He also said that his direction was limited and that the respondent was at liberty to open the box and packages except for the purpose of disclosing their contents to the Government (s. m. 187). I attach no importance to the plea of confusion. There was no appearance of confusion and his
287 testimony was given with very great care and generally after long deliberation.

Mr. Burlingame also testified that about a month after he had left the box and packages with the respondent he went to the respondent's office, opened the box and one package, refreshed his recollection and then had a consultation with the respondent (s. m. 187). He said that he had made a memorandum on a piece of paper from what he had found but did not show it to the respondent (s. m. 189). During the years 1911 and 1912 Mr. Burlingame lived in or near New York and he has New York counsel engaged in his defence to the indictments found against him in the Southern District of New York in addition to the respondent and he has consulted them more often than he has the respondent (s. m. 190, 191).

The witness, McLean, who it is contended was Mr. Burlingame's agent to communicate with the respondent, knew from Mr. Burlingame that he desired to have the box and packages sent to the respondent's office, if the respondent was in Boston at the time and would receive them (s. m. 137), and he knew that the respondent was one of Mr. Burlingame's attorneys. When asked whether Mr. Burlingame had stated to him the purpose for which the box and packages were to be sent to the respondent he said: "My recollection is no." (s. m. 110.) Later on, however, and in answer to the question whether Mr. Burlingame said anything to indicate the purpose, which question was asked many times, he first confined his answer to the statement that Mr. Burlingame wanted to know whether the respondent would receive them (s. m. 129); then he said the respondent was to receive them "as his attorney;"
288 then that he wasn't sure whether those words were used (s. m. 130); then that to his best recollection they were used (s. m. 131); then that Mr. Burlingame said he wanted the respondent to have the papers to go over them, and further "that is the meaning I got; whether he was to store them, of course, I do not know" (s. m. 132). While it is clear that this witness knew Mr. Burlingame wanted the box and packages to go to the respondent's office, there is nothing in his testimony that can be relied upon to indicate the purpose, and that question must be determined in the light of the testimony of the respondent and Mr. Burlingame and of the surrounding circumstances.

It is clear that the box and packages were not delivered to the respondent to be examined by him independently so as to enable

him to advise, but the claim is that they were delivered to and are held by him in his professional capacity for the purpose of consultation. They were delivered in August or September, 1911, and the consultation has not yet taken place. There have been interviews, but none in which the box or packages or their contents were used, and if they were delivered for the purpose claimed, it is one that has not yet been accomplished. On behalf of Mr. Burlingame, it is contended that even if they were not delivered for that purpose, that they were nevertheless held for that purpose at the time the subpœna was served on March 13, 1912, but I find nothing in the evidence to justify an inference that the original purpose was changed. After careful consideration of the evidence I am convinced, and I accordingly find, that the box and packages were delivered to the respondent and were received and held by him for safe keeping only and that there has been no change in the character of the holding.

230 V.

When the respondent was before the grand jury he was asked whether he had "received a bill of lading or shipping receipt for certain goods from one McLean, as agent of said Burlingame," and "refused to answer on the ground of privilege" (order of reference). The question was asked in an attempt to locate the books and papers called for by the subpœna, and the claim of privilege is based on the proposition that they would have been privileged in Mr. Burlingame's hands; that if the respondent had them, it was in his professional capacity; and that he could properly refuse to state whether or not they had been delivered to him by an agent.

For the reasons already given, I think the claim of privilege was not well founded, and I accordingly find that the question should have been answered. It is urged by the Government, however, that even if the privilege had existed it was waived by Mr. Burlingame in dealing with Mr. McLean, and that Mr. McLean was not his agent. Mr. McLean's business headquarters are in Boston; he has known Mr. Burlingame for a long time and is one of the respondent's clients. A considerable effort was made to show that he was Mr. Burlingame's agent for the purpose of communicating with the respondent. As stated above, the two packages were delivered by Mr. Burlingame personally. It does not appear how the box was delivered, but it was not delivered by Mr. McLean (s. m. 12). Mr. Burlingame testified that in the summer or fall of 1911 he appointed Mr. McLean his agent for the purpose of communicating with the respondent (s. m.
240 19, 35, 36). He did this because he thought he was being watched by agents of the Government, and he did not at that time wish to go to Mr. Grant's office (s. m. 40, 41). He said that on the day he made the appointment he saw Mr. McLean in the morning and again in the afternoon, and that at each interview he gave him the same questions to ask the respondent (s. m. 42). He

does not know whether or not Mr. McLean did interview the respondent on his behalf, as requested; does not think that he ever asked him to report and, as a matter of fact, he never did report. Mr. McLean testified in regard to the two interviews with Mr. Burlingame that were held on the same day, and had a great deal of difficulty with the question of his agency. He said that from what happened at the second interview, he thinks Mr. Burlingame must have requested him to see the respondent at the first interview, but that is a matter of inference on his part (s. m. 98, 96, 100, 101). He did not see the respondent between the two interviews, but says that something happened in the interim which made it unnecessary for him to see the respondent, for Mr. Burlingame told him it was all right and "to do a certain thing" with the respondent (s. m. 97, 106). He thinks Mr. Burlingame told him that he had seen the respondent in the meantime (s. m. 108). Mr. Burlingame did not say that what he told him was confidential, and they were talking simply as one business man would to another (s. m. 99). He said he did not think they were alone at the time, although they might have been (s. m. 98), and at a later hearing he said that when the question that he was to take to the respondent was given him they were alone (s. m. 124). He said there was just one question that Mr. Burlingame wanted to learn from the respondent (s. m. 125), and later that Mr. Burlingame wanted him to see the respondent and
241 ascertain whether he would receive certain bundles that were coming (s. m. 129). He, at one time, received a letter from Mr. Burlingame, the nature of which was such that he gave it to the respondent, as he felt obliged to do. At the time he gave the letter to the respondent he said that he consulted him on his own business and also on behalf of Mr. Burlingame (s. m. 116, 117, 119). He declined to state whether a bill of lading or a shipping receipt was enclosed in that letter, but did state finally that in doing what he did on behalf of Mr. Burlingame he was acting as his friend (s. m. 140). He was not in Mr. Burlingame's employ, and it is clear that, strictly speaking, he was not his agent. The question of law presented is this: If a person having a book, the contents of which would tend to incriminate him, desires to submit the book to his lawyer and sends it to his lawyer's office by a friend, must the lawyer, who has received the book in his professional capacity, divulge the means that were employed to get the book to him? If the client himself took the book to the lawyer's office and left it with the lawyer for the purpose of consultation in good faith, he would not be obliged to produce the book unless the client waived his privilege, and if the client caused the book to be taken to the lawyer's office by a friend, that act would not, in my opinion, constitute such a waiver. In 4 Whigmore on Evidence, p. 3243, it is said: "The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by any form of agency employed or set in motion by the client is within the privilege. This, of course, includes communications through an interpreter, and

also communications through a messenger or any other agent of transmission * * *." I think, therefore, that the use of Mr. McLean for such a purpose would not, in and of itself, operate as a waiver of an existing privilege, and if that is the test (as the parties appear to assume) I should find that if the books and papers would have been privileged in the hands of Mr. Burlingame, and were delivered to the respondent for the purpose of consultation, the respondent would not be obliged to answer the question whether he received a bill of lading or shipping receipt from Mr. McLean. I think, however, that in cases where the privilege claimed by a lawyer who has been subpoenaed to produce a book is questioned and issues of fact are raised which must be determined before the court can decide the question of privilege, the lawyer should be required to state whether or not he has the book, for unless he has, the question of privilege would be purely academic and there would be no occasion for the determination of other facts. I think he should not be allowed to rest on the statement that if he has the book it is privileged, for if it is really privileged in his hands, no harm is done by knowing it is there, and if he hasn't it, no harm is done. I agree that, in the absence of a waiver, no evidence that might tend to locate the books in a place where they would not be privileged should be obtained from or through a person in whose hands they would be privileged, but that is a different question and would not be involved. If delivery by a friend is a waiver, the whole privilege is gone. If it is not, no harm is done, and the very practical reason why the question should be answered is that if the books can not be produced by the person subpoenaed, the case would be disposed of.

For the reasons above set forth, I find and report the following as my formal

243 CONCLUSIONS:

First. That The Ellsworth Company is a corporation duly organized and existing under and by virtue of the laws of Arizona.

Second. That said corporation was organized on January 8, 1908, and that from and after its organization on that date, and until the close of the year 1909, it kept ledgers, journals, and cash books, and also letter files containing letters and telegrams received and copies of letters and telegrams sent by it during said period, and that said books and papers were and are corporate in character.

Third. That on March 13, 1912, a subpœna duces tecum was duly served upon the respondent directing him to appear before a grand jury in the Southern District of New York to give evidence in regard to an alleged violation of the statutes of the United States by J. D. Smith and to produce the said books and papers. That the respondent appeared before the grand jury pursuant to said subpœna and did not produce said books and papers. That he was not able to produce the same unless they were contained in a certain box or in

two certain packages in his office in Boston, Massachusetts, which box and packages he had received from one Elmer E. Burlingame. That he had not looked in said box or in said packages and declined to do so on the ground that if said books and papers were contained therein they were privileged in his hands as an attorney for said Burlingame, who had forbidden him to produce the same, if he had them, on the ground that they would tend to incriminate him.

Fourth. That Elmer E. Burlingame was indicted by a
244 grand jury in the Southern District of New York on August 30, 1911, "in connection with one Cove," and again on March 15, 1912, "in connection with The Ellsworth Company, James D. Smith, and others," and the respondent is one of the attorneys for said Burlingame.

Fifth. That the respondent is a member of the bar of the District of Columbia, of the United States Supreme Court, and of the State of Massachusetts, and is one of the attorneys for said Burlingame.

Sixth. That said Burlingame is and at all times has been the sole stockholder of said corporation, The Ellsworth Company, and that on December 31, 1909, the said company ceased doing business.

Seventh. That the legal title to said books and papers is in said corporation and not in said Burlingame.

Eighth. That if it should be held that the legal title to said books and papers passed to said Burlingame on December 31, 1909, and was in him on March 13, 1912, when the subpœna duces tecum was served upon the respondent they would not be privileged in his hands for the reason that they were and are corporate in character.

Ninth. That the said two packages were delivered to the respondent personally by Mr. Burlingame and that the said box was caused to be delivered to respondent by Mr. Burlingame in the latter part of August or early in September, 1911, and that said box and packages are now in possession of the respondent and are in his office at No. 131 State Street, Boston, Massachusetts.

245 Tenth. That the said box and packages were delivered to the respondent for safe keeping in his office and were not delivered to him in his professional capacity as attorney, or for the purpose of consultation with him in such capacity.

Eleventh. That the contents of said box and packages are not privileged in the hands of the respondent, that he should have searched therein for said books and papers, produced them if found, and should have answered the questions put to him before the grand jury.

Twelfth. That the respondent is in contempt of court for not having made such search and for not having answered such questions.

I submit and file herewith all of the evidence taken before me, consisting of 198 typewritten pages of testimony, the Government's Exhibits 2 to 4, inclusive, and the respondent's Exhibits "A" to "G," inclusive. A copy of the Government's Exhibit 1 is in the record

[illegible] (p. 33) and the original exhibit was returned to the district attorney by consent of the parties (p. 35).

All of which is respectfully submitted.

Dated New York, June 26th, 1912.

(Sgd.) Edwards H. Childs,
Referee.

946 Exhibit C.

United States District Court, Southern District of New York.

In the Matter of the Alleged Contempt of Walter B. Grant, an Attorney at Law.

EXCEPTIONS TO REFEREE'S REPORT.

The above-named respondent, Walter B. Grant, and Elmer E. Burlingame, each for himself, excepts to the report, findings, and conclusions of Edwards H. Childs, esq., the referee herein, dated the 25th day of June, 1912, and filed in the office of the clerk of this court on the 26th day of June, 1912, in the following respects:

I. In that the said referee reports or finds that no greater or different privilege exists with respect to any books or papers in the hands of an attorney, from that which exists if the same books or papers were in the hands of his client.

II. In that said referee reports or finds that the character of the books, rather than the question of legal title thereto, is the test as to whether or not the same are privileged.

III. In that the said referee reports or finds that there can be no private property in corporate entries.

IV. In that the said referee reports or finds that when a private individual acquires title to a corporate book, it is held subject to the right of the State and to the right of the United States in cases within its jurisdiction, to any records of the corporation contained 947 therein, and to the book itself to the extent necessary to obtain such records.

V. In that the said referee reports or finds that the corporate books and papers called for by the subpœna that was served on the respondent are not privileged in the hands of Mr. Burlingame, even though he had acquired title thereto from the corporation.

VI. In that the said referee reports or finds that the said Burlingame did not take physical possession of the books and papers called for by the said subpœna until some six months after December 31st, 1909, namely, until about July, 1910.

VII. In that the said referee reports or finds that the said Burlingame has given no reason why title to the books and papers of The Ellsworth Company should have been taken in himself in preference to remaining in the corporation, except that the contents of the books might tend to incriminate him.

VIII. In that the said referee reports or finds that no finds an affirmative act upon the part of Mr. Burlingame sufficient to take the title out of the corporation and put it in him to the books and papers called for by the subpoena served upon the respondent.

IX. In that the said referee reports or finds that some act, other than a mental act or process, was necessary besides what was done by Mr. Burlingame to pass title to him to the books and papers called for by the said subpoena, on or after the 31st day of December, 1903.

X. In that the said referee reports or finds that at the time the subpoena in question was served on the respondent, the legal
248 title to the books and papers called for by the subpoena was and now is in The Ellsworth Company, an Arizona corporation.

XI. In that the said referee reports or finds that there is nothing in the testimony of the witness, McLean, that can be relied upon to indicate the purpose for which the box or packages alleged to have been delivered to respondent were delivered, if delivered.

XII. If the finding of the referee that the packages and box mentioned in his report were originally deposited with the respondent for safe-keeping, then the respondent and the said Elmer E. Burlingame except to his report in that said referee reports or finds that there is nothing in the evidence to justify an inference that the original purpose for which the said packages and box were deposited was changed.

XIII. In that the said referee reports or finds that the box or packages were delivered to the respondent and were received and held by him for safe-keeping only.

XIV. In that the said referee reports or finds that the privilege claimed by the respondent in regard to the bill of lading mentioned in the report was not well founded and that the question in regard thereto should have been answered.

XV. In that the said referee reports or finds that, "strictly speaking," the witness, McLean, was not the agent of said Burlingame.

XVI. In that the report of the said referee would require the respondent to take active steps, namely, to open the box and packages in question for the purpose of ascertaining and disclosing the whereabouts of the books and papers called for by the subpoena, which books and papers would tend to incriminate said Burlingame, the client of respondent.

249 XVII. In that the said report of the said referee would require the respondent to answer the questions in regard to the bill of lading, which would tend to disclose the whereabouts of property, which, if found, would tend to incriminate the said Burlingame, the client of respondent.

XVIII. In that the said referee reports or finds that The Ellsworth Company kept journals, ledgers, and cashbooks, and also letter files containing letters and telegrams received and copies of

letters and telegrams sent by it during the period from January 8th, 1906, to the close of the year 1909.

XIX. In that the said referee reports or finds that the said books and papers were and are corporate in their character.

XX. And the said respondent and the said Burlingame each excepts to the findings and conclusions of the said referee contained in his said report and numbered "eighth," and to each and every part thereof.

XXI. And the said respondent and the said Burlingame each except to the findings and conclusions of the said referee contained in his said report and numbered "eighth," and to each and every part thereof.

XXII. And the said respondent and the said Burlingame each except to the findings and conclusions of the said referee contained his said report and numbered "eighth," and to each and every part thereof.

XXIII. And the said respondent and the said Burlingame each except to the findings and conclusions of the said referee contained in his said report and numbered "eleventh," and to each and every part thereof.

250 XXIV. And the said respondent and the said Burlingame each except to the findings and conclusions of the said referee contained in his said report and numbered "twelfth," and to each and every part thereof.

Dated New York, July 6th, 1912.

KRENER, FLANNAGAN & ERSKINE,
Attorneys for Respondent and E. E. Burlingame,
58 Wall Street, Borough of Manhattan, City of New York.

To HENRY A. WISE, Esq.,
United States Attorney, Southern District of New York.

THOMAS ALEXANDER, Esq.,
Clerk of the United States District Court,
Southern District of New York.

Admission given. July 9, 1912. U. S. Dist. Ct., Southern Dist., N. Y.

251 EXHIBIT D.

United States District Court, Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

SIRS: Please take notice that upon the presentment of Walter B. Grant made before this court on March 28th, 1912, by the grand jury of the United States of America for the Southern District of New York, and upon the order of this court dated March 28th, 1912, and filed in this court on April 8, 1912, by which Edwards H. Childs, Esq., was appointed referee to take evidence with respect to certain matters set forth in said order and to report such evidence with his conclusions thereon to the court, and upon the report of said Edwards

H. Childs, made pursuant to said order, duly filed in this court on June 25, 1912, together with the evidence taken before said Edwards H. Childs, a motion will be made before the Hon. Learned Hand, district judge, on the 17th day of July, 1912, at the opening of court on that day for the hearing of motions in the United States court house and post office building for an order confirming the said report of said referee and for an order punishing said Walter B. Grant for contempt of court, and for such other and further relief as may be just and equitable in the premises.

July 12th, 1912.

289 HENRY A. WISE,

United States Attorney for the Southern District of New York. Office and post office address, Room 50, P. O. Building, Borough of Manhattan, City of New York.

To Messrs. KERNER, FLANNAGAN & ERSKINE, *Attorneys for Walter B. Grant, 68 Wall Street, N. Y. City.*

288 EXHIBIT E.

United States District Court, Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

COUNTY OF NEW YORK, ss:

WALTER B. GRANT, being duly sworn, says:

That he is the respondent herein.

Deponent has read the report of the referee, Mr. Childs, and is greatly surprised to find that the referee holds that the packages and box referred to in the report were deposited with deponent not for consultation, but for safe-keeping. Such finding on the part of the referee was entirely unanticipated by deponent, and deponent cannot account for it, except upon some theory that the referee was under the impression that deponent was simply Mr. Burlingame's general attorney, instead of being also particularly engaged in connection with the wireless business of Mr. Burlingame and in connection with the criminal charge against him and one Cove.

As a matter of fact, deponent had been actively engaged as counsel for Mr. Burlingame on those subjects for a long time prior to the day when the packages and box in question were left with him, and deponent would have made this more clear before the referee had he anticipated any such position on the referee's part.

284 Deponent submits that it would be a great injustice to have a finding of the referee stand when the facts are so much to the contrary, if only because they have not been brought out.

Since the reference has closed, and since deponent has seen the referee's report, he has examined his records for the purpose of

ascertaining and refreshing his memory on the subject of the extent of his services to and consultations with Mr. Burlingame, prior to the leaving with him of the packages and box in question, on the subject of Mr. Burlingame's wireless business and on the subject of the criminal charge against him in connection with one Clove.

Prior to June 19, 1909, an investigation had been started by the post-office inspectors in connection with the wireless business.

On June 19, 1909, deponent, at Mr. Burlingame's request, came to the city of New York from Boston, for the purpose of seeing Mr. Burlingame and consulting with him in connection with the investigation which the post-office inspectors had started.

On July 29th, 1909, deponent was again summoned to New York by Mr. Burlingame and remained with him the entire day, consulting on his rights and on the facts in connection with Mr. Burlingame's relations to the wireless business.

On July 15th, 1909, deponent was again in New York in the same connection, and again on August 20th, 1909, deponent was summoned to New York by Mr. Burlingame by telephone, and was in New York on that day on consultation with him.

255 Deponent remained over on the 21st of August, at Mr. Burlingame's request, and was again in New York on the 27th and 28th of August on Mr. Burlingame's wireless business.

On September 22nd and 26th, 1909, deponent was engaged in Boston in connection with certain business of Mr. Burlingame's relating to wireless.

On October 22nd, 1909, Mr. Burlingame visited deponent at his office in Boston and had an interview.

On October 25th, 1909, deponent had a conversation by telephone with Mr. Burlingame on the subject of wireless, Mr. Burlingame being in New York.

On October 29th, 1909, deponent was engaged all day with Mr. Burlingame in connection with wireless matters in New York.

On November 5th, 1909, deponent was again in New York, at Mr. Burlingame's request, in regard to his wireless business.

On November 8th, 1909, deponent was engaged in behalf of Mr. Burlingame in connection with wireless business and wrote a letter in his behalf, and on the 9th of November, 1909, was engaged in an interview with Mr. Burlingame, on his behalf, in the same connection, and the same thing occurred on December 1st, 1909.

On January 4th, 1910, deponent was engaged in Mr. Burlingame's behalf and wrote a letter on that day in his interest in connection with wireless matters.

On August 1st, 1910, deponent had an interview with Mr. Burlingame in Boston.

That between August, 1910, and the latter part of August, 1911, deponent was absent in California, Washington, D. C., and
256 Texas a large part of the time, approximately eight months, but there were a number of interviews with Mr. Burlingame,

but that no record of them appears on deponent's books, though deponent recalls that interviews occurred during those periods.

That for six or seven weeks in August and September, 1910, he was in California; that from the last week in November, 1910, to early in April, 1911, he was continuously away from Boston on legal business in the State of California and Texas; that during April, 1911, and the first week of May, 1911, he was part of the time in Washington, D. C.; and from May 10th, 1911, to about July 4th, 1911, he was at El Paso, Texas, before the International Arbitration Court, representing the United States as its counsel.

From about 1906 on deponent's record of interviews with his clients was by no means complete. From that time on it has not been deponent's custom to keep complete records of all interviews, but deponent knows that there were interviews from time to time within the periods above mentioned which he had with Mr. Burlingame which do not appear on his books.

The learned referee held at the hearing that the declaration of Mr. Burlingame to Case and Granger that he had taken over as his own property the books of The Ellsworth Company were irrelevant, yet he now seems to hold in his report that there is lacking a sufficient showing of overt acts on Mr. Burlingame's part to show a taking of title to the books and papers of The Ellsworth Company. This is referred to by the referee in his report in connection with the question as to whether title to such books and papers passed to Mr. Burlingame.

257 On the hearing before the referee counsel desired to take the depositions of Messrs. Case and Granger, but their application was denied on the ground of irrelevancy, and in view of the report of the referee deponent submits herewith affidavits of both of these parties sustaining the testimony of Mr. Burlingame as to what passed between him and them.

WALTER B. GRANT.

Subscribed and sworn to before me this 23rd day of July, 1912.

DAISY V. MONAHAN,
Notary Public, Kings Co.

Cert. filed in N. Y. Co., #75.

258 United States Circuit Court, Southern District of New York.

MATTER OF CONTEMPT PROCEEDINGS AGAINST ELMER E. BURLINGAME.

STATE OF IOWA, *county of Adair:*

MAURICE A. CASE, being duly sworn, says:

I am 40 years of age. I now live at Adair, Iowa.

In the year 1910 I was secretary of The American Trustee Company of New Jersey. During that year at times I did considerable

clerical work for The American Trustee Company of New York, in New York City, at the request of Orley C. Granger, who was president of that company. In the early summer of the year 1910 Mr. Granger said to me that Elmer E. Burlingame had turned over to his company (Granger's) for safe keeping the account books formerly used by The Ellsworth Company. I was familiar with the books of that company and knew it to be an Arizona corporation. At the request of Mr. Granger I then had the above-mentioned books packed and shipped to his company's correspondent, The American Trustee Company, of Hartford, Connecticut. The president of The American Trustee Company put the boxes in a storage warehouse, taking a receipt therefor in the name of The American Trustee Company. The receipt showing storage of the boxes was sent to The American Trustee Company of New York, together with an order on the storage warehouse for delivery of the boxes to bearer, said order being signed by the president of The American Trustee Company.

On Mr. Granger's order and at Mr. Burlingame's request I delivered to Mr. Burlingame the receipt and order aforesaid, so that Burlingame could get the boxes when he wanted them, I understanding from both Mr. Granger and Mr. Burlingame that the contents of the boxes, which included the ledgers, journals, and cash books formerly used by The Ellsworth Company, had been taken over by Mr. Burlingame as his property when The Ellsworth Company was abandoned and went out of business.

(Signed) MAURICE A. CASE.

Subscribed and sworn to before me this 21st day of December, nineteen hundred and eleven.

W. H. CROOK, *Notary Public.*

(Notary's seal impressed.)
Usual certificate attached.

United States Circuit Court for the Southern District of New York.

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ELMER E. BURLINGAME.

STATE OF IDAHO,
County of Bonner, ss:

ORLEY C. GRANGER, being duly sworn, says:

I am thirty-seven years of age. I live at Hope, Bonner County, Idaho.

In the summer of 1910 I was president of The American Trustee Company of New York. Sometimes during the early part of that summer Elmer E. Burlingame said to me that he wished to turn over to my company for safe-keeping the account books formerly used by The Ellsworth Company, which books he stated had been taken over

by him as his property upon the abandonment of The Ellsworth Company, and the books were accordingly turned over to The American Trustee Company of New York.

The said Ellsworth Company was an Arizona corporation.

OSLEY C. GRANGER.

Subscribed and sworn to before me this 28th day of December, 1911.

JOHN A. TIPTON,
Notary Public, Bonner County, Idaho.

My commission expires Dec. 8th, 1915.
(Notary's seal impressed.)

261 EXHIBIT G.

At a stated term of the United States District Court, held in and for the Southern District of New York, in the Federal Building, New York City, Borough of Manhattan, on the second day of August, 1912.

Present: Hon. Learned Hand, justice.

IN RE THE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

This cause came on to be heard before the court at a stated term thereof held at New York City on the 24th day of July, 1912, upon the report of the referee hitherto filed herein and was argued, and thereupon, upon consideration thereof, it is—

Ordered, adjudged, and decreed that the respondent herein is in contempt for failing to examine the contents of the box and packages referred to in his testimony before the referee herein to ascertain whether they contain the papers specified in the subpœna and for failing to answer the questions to the grand jury put to him concerning them, and it is further—

Ordered, adjudged, and decreed that he may purge himself of the same by examining the said box and packages, and answering such questions if subpœnaed before another grand jury of the Southern District of New York, producing the same in case the said
262 papers do correspond with such subpœna, and it is further—

Ordered, adjudged, and decreed that the respondent be, and he hereby is, fined a sum equal to the fees of the referee herein and any stenographer's fees upon the hearing, and it is further—

Ordered, adjudged, and decreed that all findings of the referee except the seventh are confirmed.

LEARNED HAND, *D. J.*

(Indorsed:) U. S. District Court. Aug. 2, 1912. S. D. of N. Y.

263 EXHIBIT F.

United States District Court, Southern District of New York.

IN RE ALLEGED CONTEMPT OF WALTER B. GRANT, AN ATTORNEY AT LAW.

Appearances: William A. Keener, Esq., Dallas Flannagan, Esq., attorneys for Walter B. Grant; Henry A. Wise, Esq., United States district attorney, by Robert Stephenson, Esq.

HAND, D. J.:

In Wilson *v.* U. S., 221 U. S. 361, Wilson originally had custody of the corporate records as president, but before the second presentment of the grand jury the directors had demanded them of him and he had refused to deliver them. Therefore, the first subpœna went before the demand, the second after, but the court did not distinguish. Now with the first I have here no concern, because while Wilson did not maintain any possession against the corporation, his custody was the corporation's, and the only question was whether he could protect himself from self-incrimination through that fact. That, too, was Drier's case, which was decided at the same time as Wilson's. However, after Wilson assumed personal possession of the books a different question arose. The court might have said that his possession would be respected as privileged, whether as against the corporation it was lawful or not, and that until the corporation had got back the books from Wilson's wrongful pos-
264 session, no writ should go. That would have been to deny the privilege to the corporation only, but to allow it to the individual no matter what was the original character of the books. Of course, such a result would have been most undesirable in practise, and yet I think that it would necessarily be the result if the papers had not been public in character. For instance, suppose that A. knowing that B. has papers which would incriminate him, gets wrongful possession of them from B., whom they do not incriminate. If B. is content, and leaves A. in possession I do not understand that it would be any answer whatever to A. to say: "You cannot keep these back, because you came by them wrongfully, or at least you have no right to them now." All the law considers is whether A. has got possession in fact, and whether the documents actually will tend to incriminate him. To get them in evidence the law would have to force him to bring them out of a possession which is good enough against any one but B. Certainly, I can find nothing in the books which suggests such a distinction, and it contradicts the whole history of the matter. For the privilege runs along side by side with the power to compel production and that power depends only upon serving the actual possessor. There are cases to be sure where one having custody is not required to produce, but it is only because

his custody is so subordinate as not to justify his meddling with documents even to bring them to court. Certainly, a full possessor of the documents is always subject to subpœna, whether his possession is lawful or unlawful, and regardless of ownership.

265 to 269 Now the Supreme Court paid no attention whatever to this distinction, for they put the decision upon the quasi-public character of the record when it was originally made, which, as I read it, subjected it as a document to production in anyone's hands, whether it hurt him or not to discover it. That certainly is the burden of Mr. Justice Hughes's opinion, and for the reasons I have given, I think it is the logic of the decision. If so, the question of legal title does not matter; indeed, this case shows how little it should. For the respondent concedes that Burlingame would have had to produce these books during the years 1908 and 1909, merely because he had no legal title, though he owned all the stock; but he insists that the passage of title makes the whole difference. Surely that is very dry straw.

However, the referee made a finding on the question of title, and the parties seem to think that my finding may affect the scope of an appeal, though it really is only a matter of legal conclusion from undisputed evidence. The respondent relies upon Burlingame's assumption of ownership when he delivered the books to Granger for storage, coupled with his previous expression of intention to take them over as his own. Was there an adequate delivery of the property? Since Burlingame already had possession, all that was needed was words in præsenti, Kilpin v. Ratley, 1892, 1 Q. B., 582; Allen v. Cowan, 23 N. Y., 502; indeed not even words were necessary, if there were any other act which showed the purpose. Nor was it as though only the separate stockholders signed a consent, for Burlingame was the corporate manager vested with all powers as well as the sole stockholder. No one disputes that a bill of sale on behalf

270 of the corporation signed by him would have served. Whether he had formal authority or not, he had actual authority to bind the corporation. How must his acts be interpreted, if one believes his testimony? I think they should be interpreted like those of an executor who is sole legatee and who begins to use the goods after he had advertised for debts, and paid them off, Blood v. Kane, 130 N. Y., 514, Re Mullen, 145 N. Y., 98; the title is in the individual. There may be a fictitious executorial "persona" or not, there may be corporate "persona"; certainly, for most purposes it is better to speak in the simpler terms which such ideas permit, but I will not force the necessity of form so far as to hold that when the sole stockholder stops the business, pays the debts, takes over possession of the property, and announces that he has wound up the corporation he must either execute a bill of sale to himself or make a public declaration of gift from the corporation. I concede this, if as in the case of realty some writing was a necessary form to the passage of title, but where the law allows it to be done in pais, such conduct as this will answer all the requisite forms.

However, all this is a very barren and futile inquiry from any point of view, because whether Burlingame had title or not, he certainly had the right to keep the possession which he already had, and if the case of Wilson v. U. S., supra, turns in any sense upon the fact that Wilson was a trespasser quoad his corporation, then the only material consideration here is that Burlingame had
271 absolute right of possession as against every one, including himself in his incorporated persona.

The next question is whether Grant held the box and packages bona fide as attorney and for purposes of consultation or whether they were given him to avoid seizure by the authorities. Much, perhaps most, of the testimony was taken upon this issue before an eminently capable and careful referee, who has found that the deposit was made without any intention to use the books for purposes of consultation. He saw the witnesses, and his conclusion I shall accept. The testimony of McLean is certainly valueless, even in type, because what he says is a hopeless jumble of words, for the most part, and for the rest so uncertain and vague as to be unreliable. Burlingame own testimony was most contradictory, and his interest entitled the referee to disregard it. As to the respondent's own testimony, he feels clear now that his original instructions included consultation, but he concedes that as to a part of the conversation he is vague, i. e., whether he originally received the injunction not to open them. His first impression certainly was that he had no such right from the original circumstances of their deposit with him. There was a probable reason for getting the books out of Burlingame's hands, which did not include any consultation, and, in fact, no consultation ever occurred. I must confess that on a mere reading of the testimony I should not have come to the same conclusion as the referee, but there was enough in the case to justify his conclusion that the claim of professional privilege was not made out, giving that conclusion the benefit to
272 which it is entitled from the fact that he could so much better get the actual facts of the situation. Questions of credibility and the value of the recollection of witnesses should always, except in clear cases, remain as they are determined by the tribunal which actually sees them.

Since the respondent has been found not to have received the boxes as a lawyer, he has no privilege to decline to answer whether or not they are the books mentioned in the subpœna, and Burlingame's injunction to the contrary cannot prevail over the demands of justice. It is not Burlingame who is compelled to act in a testimonial character, but Grant, who did not receive them within his professional privilege.

Therefore the respondent will be required in this proceeding to examine the box and packages without injuring their wrappings and to answer the question whether they contain any of the books mentioned in the subpœna; if so, he will hold these subject to the order of a new subpœna to produce the books as evidence. He is

fined, in any event, the costs of this proceeding; that is, the referee's and stenographer's fee. If he should decline to produce the books upon another subpœna, the March grand jury having adjourned, a summary motion upon that subpœna will at once be followed by a commital, but there is no need in this proceeding to go further.

I confirm all the findings of the referee except the seventh. An order may be entered in accordance with this opinion.

273 United States District Court for the Southern District of New York.

In the Matter of the Alleged Contempt of Walter B. Grant, an attorney at law; Walter B. Grant, plaintiff in error,
vs.
United States of America, defendant in error.

To the district judges of the United States for the Southern District of New York:

The petition of Walter B. Grant, the respondent herein, respectfully shows:

That an order was entered herein on the 2nd day of August, 1913, adjudging your petitioner to be guilty of contempt.

Your petitioner in such proceedings as he has taken has been moved by a conviction that he was fulfilling his duty as a counsellor of the court in refusing to answer such questions as were propounded to him and are referred to in the said order.

The petitioner alleges that a grave question of law is involved in this proceeding, and he believes, with great respect, that error has been committed by the learned court in making the said order.

The petitioner desires to review the determination of the learned court, and upon this petition his assignment of errors herewith granted and upon all the papers and proceedings filed herein,
274 he now prays for a writ of error whereby the said determination may be reviewed by the Supreme Court of the United States, and your petitioner also prays that his time to file the bill of exceptions and assignment of errors, now presented to the court, be extended to the present time, if any time be needed.

On the 7th inst. your petitioner was served by the United States marshal, at the instance of the United States attorney for the Southern District of New York, with two subpœnas, copies of which are hereto annexed as a part hereof.

One of said subpœnas calls for the production of "Ledgers, journals, and cashbooks of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received and copies of letters and telegrams sent by said company during the years 1907, 1908, and 1909."

The other subpœna calls for the contents of the packages and box referred to in the proceedings above entitled and in the testimony therein, the language being as follows:

"All papers, books, and documents contained in two packages and one box received by you in August or September, 1911, from Elmer E. Burlingame and placed in your office at 131 State Street, Boston, Massachusetts, a more exact description of which said contents cannot be here set forth, for the reason that the same is unknown; also the said packages and boxes, together with any writings, memoranda, or tags thereon."

275 Petitioner calls the attention of the court to the fact that the second subpœna above mentioned concedes a lack of knowledge on the part of the Government as to the contents of the said packages and box, but nevertheless demands the production of the same intact.

Dated New York, September 9th, 1912.

WALTER B. GRANT,
By KEENER, FLANNAGAN & ERSKINE,
His Attorneys.

Office and post office address, 32 Wall Street, Borough of Manhattan, New York City.

COUNTY OF NEW YORK, *ss:*

DALLAS FLANNAGAN, being duly sworn, says:

That he is one of the attorneys for Walter B. Grant, the petitioner above named. That he has read the foregoing petition and knows the contents thereof. That he has been one of the counsel for said Grant during this proceeding. That he verily believes each and every of the statements contained in the above petition to be true. The reason this verification is not made by petitioner is that he is not within the State of New York.

DALLAS FLANNAGAN.

Subscribed and sworn to before me this 19th day of September, 1912.

[SEAL.] DAISY V. MONAHAN,
Notary Public, Kings Co.

Cert. filed in N. Y. Co., #75.

I hereby respectfully join in the above petition.

E. E. BURLINGAME,
By KEENER, FLANNAGAN & ERSKINE,
His Attorneys.

276 (Copy.)

The President of the United States to Walter B. Grant, Esq., 18 Tremont Street, Boston, Mass., greeting:

We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the

people of the United States of America for the Southern District of New York, at a District Court to be held at the United States court-house and post office building, Borough of Manhattan, city of New York, on the thirteenth day of September, 1912, at eleven o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the statutes of the United States by J. D. Smith, and not to depart the court without leave thereof or of the district attorney, and that you produce at the time and place aforesaid the following:

Ledgers, journals, and cashbooks of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received and copies of letters and telegrams sent by said company during the years 1907, 1908, and 1909.

And for a failure to attend and produce the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness the Hon. George C. Holt, judge of the United States District Court at the Borough of Manhattan, in the city of New York, on the sixth day of September, 1912.

(Signed) THOS. ALEXANDER, *Clerk.*

HENRY A. WISE (signed),
United States Attorney for
The Southern District of New York.

A true copy.
Attest:

DONALD CAMERON,
Deputy U. S. Marshal.

277 (Copy.)

The President of the United States to Walter B. Grant, esq., 18 Tremont Street, Boston, Mass., Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at the United States court house and post office building, borough of Manhattan, city of New York, on the thirteenth day of September, 1912, at eleven o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the statutes of the United States by J. D. Smith, and not to depart the court without leave thereof or of the district attorney, and that you produce at the time and place aforesaid the following:

All papers, books, and documents contained in two packages and one box received by you in August or September, 1911, from Elmer E. Burlingame and placed in your office at 131 State Street, Boston, Massachusetts, a more exact description of which said contents cannot be here set forth, for the reason that the same is unknown; also the said packages and boxes together with any writings, memoranda, or tags thereon.

And for a failure to attend and produce the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness, the Hon. George C. Holt, judge of the United States District Court, at the borough of Manhattan, in the city of New York, on the sixth day of September, 1912.

(Signed) THOS. ALEXANDER, *Clerk.*

HENRY A. WISE (signed),
United States Attorney for the
Southern District of New York.

A true copy.
Attest:

DONALD CAMERON,
Deputy U. S. Marshal.

278 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant, plaintiff in error, vs. United States of America, defendant in error. (Copy.) Petition. Keener, Flannagan & Erskine, attorneys for plaintiff in error. 52 Wall street, borough of Manhattan, New York City. U. S. District Court. Oct. 1, 1912. S. D. of N. Y.

279 United States District Court for the Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF Walter B. Grant, an attorney at law; Walter B. Grant & E. E. Burlingame, plaintiff in error,

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

BILL OF EXCEPTIONS.

This is a proceeding for the punishment of the respondent and plaintiff in error, Walter B. Grant, for contempt of court in failing to answer certain questions propounded to him before the March, 1912, grand jury for the southern district of New York.

On the 28th day of March, 1912, the said Walter B. Grant, having appeared before the grand jury and having refused to answer questions propounded to him, he was presented to the court, the Hon. Learned Hand, United States district judge, presiding.

Thereupon an order of the court was made reciting the facts and occurrences, and said order was filed in the office of the clerk of the United States District Court for the Southern District of New York on the 28th day of March, 1912, and is made a part of this bill of exceptions as if fully set forth, and is to be considered as hereto annexed and marked "Exhibit A."

280 Thereupon, pursuant to said order, proceedings were taken before the referee, Edwards H. Childs, Esq., therein mentioned, and certain testimony was taken, and thereupon the said referee made his report and the same was filed in the office of the clerk of the United States District Court for the Southern District of New York on the 25th day of June, 1912, and said report and all evidence taken before the referee, and all the papers therein mentioned, are to be considered as part of this bill of exceptions and hereto annexed as "Exhibit B."

Thereupon the respondent, Walter B. Grant, filed exceptions to the said report of the said referee in the office of the clerk of the United States District Court for the Southern District of New York on the 9th day of July, 1912, which exceptions are to be taken as part of this bill of exceptions and hereto annexed and marked "Exhibit C."

Thereupon notice of motion was given to confirm the said report of the said referee, which notice of motion was dated on the 12th day of July, 1912, and is to be considered as part of this bill of exceptions and marked "Exhibit D."

Thereupon the matter came duly on to be heard before the Hon. Learned Hand, judge of the United States District Court for the Southern District of New York on the 24th day of July, 1912.

Thereupon the respondent, Walter B. Grant, appeared in court in person and also through one of his counsel, Dallas Flannagan, and asked leave to file in opposition to the motion certain affidavits of himself, Orley C. Granger, and Maurice A. Case, verified re-
281 spectively, on the 23rd day of July, 1912; on the 28th day of December, 1911; and on the 21st day of December 1911; and the said application to read said affidavits in opposition having been granted by the court, the said affidavits were so read and were filed in the office of the said clerk on the 24th day of July, 1912, and are to be taken as part of this bill of exceptions as if set forth in full and marked "Exhibit E."

Thereupon, after due deliberation, the said Hon. Learned Hand handed down an opinion, which was filed in the office of the said clerk on the 2nd day of August, 1912, and is to be taken as part of this bill of exceptions, as if here set forth in full and marked "Exhibit F."

Thereupon the said Hon. Learned Hand, United States district judge, entered an order on the 2nd day of August, 1912, and the said order was filed in the office of the said clerk on that day, and the same is to be taken as part of this bill of exceptions and marked "Exhibit G."

Thereupon the respondent, Walter B. Grant, presented an assignment of errors, and the same was on the 1st day of October, 1912, filed in the office of the said clerk, and is to be taken as part of this bill of exceptions and marked "Exhibit I."

283 The testimony contained in the report of the said referee, together with the said affidavits of Grant, Granger, and Case, are all the testimony taken in this proceeding.

To the rulings of the court counsel for the respondent have excepted, as set forth in their said assignment of errors, and tender this, their bill of exceptions, to the court to sign and seal, and the court does hereby sign and seal the same.

And now and in furtherance of justice and that right may be done, the respondent, Walter B. Grant, presents the foregoing as his bill of exceptions in the case and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

KEENER, FLANNAGAN & ERSKINE,
Attorneys for Walter B. Grant & E. E. Burlingame.

Office and post office address, 52 Wall Street, Borough of Manhattan, New York City.

Settled and allowed this first day of October, 1912.

(Sgd.) LEARNED HAND,
U. S. District Judge, Southern District of New York.

283 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant et al., plaintiffs in error, vs. United States of America, defendant in error. (Copy.) Bill of exceptions. Keener, Flannagan & Erskine, attorneys for plaintiffs in error. 52 Wall Street, Borough of Manhattan, New York City. U. S. District Court. Filed Oct. 1, 1912. S. D. of N. Y.

284 EXHIBIT I.

United States District Court for the Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. GRANT, an attorney at law, Walter B. Grant and E. E. Burlingame, plaintiffs in error,
vs.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS.

The plaintiffs in error, Walter B. Grant and E. E. Burlingame, hereby assign errors for the order adjudging him in contempt herein entered on the 2nd day of August, 1912, as follows:

1. It was error for the said court to hold that the plaintiff in error had been guilty of contempt of the court for failing to examine the contents of the box and packages referred to in his testimony before the referee herein, to ascertain whether they contained the papers specified in the subpœna, and for failing to answer questions to the grand jury put to him concerning them.

2. It was error for the said court to hold that the said plaintiff in error should be fined a sum equal to the fees of the referee herein and any stenographer's fees upon the hearing.

3. It was error for the said court to hold that the plaintiff in error should make search in his office for the purpose of disclosing
285 the whereabouts of the books and papers called for by the subpœna referred to in the order of the court.

4. It was error for the said court to hold that the plaintiff in error was not entitled to claim privilege from answering the questions propounded to him by the grand jury and that he is not entitled to claim privilege from ascertaining or disclosing the contents of the box and packages in his possession mentioned in said order.

5. It was error for the court to hold that the plaintiff in error should make a search in the packages and box in his office for the books and papers called for by the subpœna duces tecum referred to in the said order by virtue and by reason of the said subpœna duces tecum.

6. It was error for the court to hold that the plaintiff in error was in contempt.

7. It was error for the court to confirm the report or finding of the referee, if he so finds, that no greater or different privilege exists with respect to any books or papers in the hands of an attorney from that which exists if the same books and papers were in the hands of his client.

8. It was error for the court to confirm the finding of the referee, if he so finds, that the character of the books rather than the question of legal title thereto is the test as to whether or not the same are privileged.

9. I was error for the court to confirm the finding of the referee, if he so finds, that there can be no private property in corporate entries.

10. It was error for the court to confirm the finding of the referee,
if he so finds, that when a private individual acquires title to a
286 corporate book it is held subject to the right of the State and to the right of the United States in causes within its jurisdiction to any records of the corporation contained therein and to the book itself, to the extent necessary to obtain such records.

11. It was error for the court to confirm the finding of the referee, if he so finds, that the corporate books and papers called for by the subpœna are not privileged in the hands of Elmer E. Burlingame, the respondent's client, even if Burlingame had acquired title thereto from the corporation.

12. It was error for the court to confirm the finding of the referee, if he so finds, that said Burlingame did not take physical possession of the books and papers called for by the subpœna until some six months after December 31st, 1909, namely, about July, 1910.

13. It was error in that the court confirms the finding of the referee, if he so finds, that there is nothing in the testimony of the witness McLean that can be relied upon to indicate the purpose for which the box and packages were alleged to have been delivered to the respondent, were delivered, if delivered.

14. If the finding of the referee that the packages and box mentioned in his report were originally deposited with the respondent for safe-keeping be found to be correct by the Appellate Court, then it was error for the court to confirm the report of the referee, if he so reports, that there is nothing in the evidence to justify an inference that the original purposes for which the said packages and box were deposited was charged at the time the subpœna was served.

267 15. That it was error for the court to confirm the finding of the referee, if he so finds, that the box and packages mentioned in his report were delivered to the respondent and were received by him for safe-keeping only and not for consultation.

16. It was error for the court to confirm the report of the referee, if he so finds, that the privileges claimed by the respondent in regard to the bill of lading mentioned in the report was not well founded and the question in regard thereto should have been answered.

17. It was error for the court to confirm the finding of the referee, if he so finds, that strictly speaking, the witness McLean was not the agent of said Burlingame.

18. It was error for the court to confirm the finding of the referee, if he so finds, in the respect that the report of the referee would require the respondent to take active steps, namely, to open the box and packages in question for the purpose of ascertaining and disclosing the books and papers called for by the subpœna, which books and papers might tend to incriminate the said Burlingame, the client of respondent.

19. It was error for the court to require the respondent Grant, who is the attorney of Elmer E. Burlingame, to search in the box and packages mentioned in the order for the purpose of ascertaining and disclosing the contents and of disclosing the whereabouts of the books and papers called for by the subpœna, which books and papers would tend to incriminate the said Burlingame, who is the respondent's client.

270 20. It was error for the court to confirm the referee's finding, if he so finds, and it is error for the court to require, if the court so requires, that the respondent should answer the questions in regard to the bill of lading, which questions would tend to disclose the whereabouts of the property, which, if found, would tend to incriminate the said Burlingame, the client of respondent.

21. It was error in that the court confirms the finding of the referee that The Ellsworth Company kept journals, ledgers, and cashbooks, and also letter files containing letters and telegrams received and copies of letters and telegrams sent by it during the period from January 8th, 1906, to the close of the year 1909.

22. It was error in that the court confirms the finding of the referee that the said books and papers were and are corporate in their character.

23. It was error in that the court confirms the finding of the referee contained in his said report and numbered eighth.

24. It was error in that the court confirms the finding of the referee contained in his said report and numbered tenth.

25. It was error in that he court confirms the finding contained in the report of the referee and numbered eleventh.

26. It was error in that the court confirms the finding of the referee contained in the report and numbered twelfth.

289 27. It was error for the court to hold that if the respondent should decline to produce the books and papers mentioned in the said subpœna under a subsequent subpœna to be served upon him, that a summary motion upon such subsequent subpœna should be followed at once by a committal.

28. It was error for the court to hold that no privilege can exist with reference to the books and papers called for by the subpœna because they were corporate in character when made.

29. It was error for the court to hold that the respondent did not receive the books and papers called for by the subpœna within his professional privilege.

The respondent, Walter B. Grant, prays that the said order entered herein on the 2nd day of August, 1912, may be reversed.

Dated New York, September 19, 1912.

KEENER, FLANNAGAN & ERSKINE,
Attorneys for plaintiffs in error and respondents,
Walter B. Grant and E. E. Burlingame.

Office and post-office address, 52 Wall Street, Borough of Manhattan, New York City.

290 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant et al., plaintiffs in error, vs. United States of America, defendant in error. (Copy.) Assignment of errors. Keener, Flannagan & Erskine, attorneys for plaintiffs in error, 52 Wall Street, Borough of Manhattan, New York City. United States District Court. October 2, 1912. Southern District of New York.

291 NOTICE OF APPEAL.

United States District Court for the Southern District of New York.

IN THE MATTER OF THE ALLEGED CONTEMPT OF WALTER B. Grant, an attorney at law; Walter B. Grant and E. E. Burlingame, plaintiffs in error, *against* UNITED STATES OF AMERICA, DEFENDANT IN ERROR.	

The above-named Walter B. Grant and E. E. Burlingame, conceiving themselves aggrieved by the order entered on the 2nd day of August, 1912, by the Hon. Learned Hand, United States district judge for the Southern District of New York, in the above entitled proceeding, doth hereby appeal from said order to the Supreme

Court of the United States, and from each and every part of said order, and they pray that this, their appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

September 19th, 1912.

KEENER, FLANNAGAN & ERSKINE,
Attorneys for Walter B. Grant and E. E. Burlingame, Applts.

Office and post-office address, 52 Wall street, Borough of Manhattan, New York City.

New York, September 30, 1912.

And now, to wit, on October first, 1912, it is ordered that the appeal be allowed as prayed for.

LEARNED HAND,
U. S. District Judge, Southern District of New York.

162 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant et al., plaintiffs in error, vs. United States of America, defendant in error. (Copy.) Notice of appeal. Keener, Flannagan & Erskine, attorneys for appellants, 52 Wall Street, Borough of Manhattan, New York City. United States District Court. Filed Oct. 1, 1912. S. D. of N. Y. A copy of the within paper has been this day received at this office, Oct. 1, 1912. Henry A. Wise, U. S. attorney.

163 WRIT OF ERROR.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the judges of the District Court of the United States, for the Southern District of New York, greeting:

Because, in the record and proceedings as also in the rendition of the judgment, of a plea which is in the district court before you or some of you, between Walter B. Grant and E. E. Burlingame, plaintiffs in error, against United States, defendant in error, a manifest error hath happened to the great damage of the said Walter B. Grant and E. E. Burlingame, as is said and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Supreme Court, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the judges aforesaid, on the thirty-first day of October, 1912, that the record and proceed-

ings aforesaid being inspected, the said judges of the United States District Court for the Southern District of New York, may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States, ought to be done.

294 Witness Hon. Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 1st day of October, in the year of our Lord, one thousand nine hundred and twelve, and of the Independence of the United States, the one hundred and thirty-seventh year.

THOS. ALEXANDER,
Clerk of the United States District Court for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
U. S. District Judge, Southern District of New York.

295 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant et al., plaintiffs in error vs. United States of America, defendant in error. (Copy.) Writ of error. Keener, Flannagan & Erskine, attorneys for plaintiffs in error, 52 Wall Street, Borough of Manhattan, New York City. U. S. Dist. Court. Oct. 1, 1912. S. D. of N. Y.

296 CITATION.

UNITED STATES OF AMERICA, *ss:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the city of Washington, on the thirty-first day of October, 1912, pursuant to a writ of error, from an order adjudging Walter B. Grant to be guilty of contempt of court, filed August 2nd, 1912, in the office of the clerk of the United States District Court for the Southern District of New York, to show cause, if any there be, why the decision of the United States District Court for the Southern District of New York in the said writ of error mentioned should not be reversed, modified, or corrected, and speedy justice should not be done in that behalf.

Given under my hand in the city of New York, in the Southern District of New York, on the first day of October, 1912.

LEARNED HAND,
U. S. Dist. Judge, Southern District of New York.

Filed Oct. 1, 1912.

297 (Indorsed:) United States District Court, Southern District of New York. Walter B. Grant, plaintiff in error, vs. United States of America, defendant in error. (Copy.) Citation. Keener, Flannagan & Erskine, attorneys for plaintiff in error, 52 Wall Street, Borough of Manhattan, New York City. U. S. District Court.

Filed Oct. 1, 1912. S. D. of N. Y. A copy of the within paper has been this day received at this office, Oct. 1, 1912. Henry A. Wise, U. S. attorney.

298 (Copy.)

Know all men by these presents, that the National Surety Company, a New York corporation having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, city of New York, are held and firmly bound unto the United States of America, in the sum of two hundred fifty ($250.00) dollars, to be paid to the United States of America, for the payment of which well and truly to be made, it binds itself and its assigns, firmly by these presents.

Sealed with its seal and dated the 3rd day of October, 1912.

Whereas, Walter B. Grant and E. E. Burlingame, have applied to the Supreme Court of the United States, by appeal and writ of error for a review of the questions of law and of fact involved in a certain decision or order filed in the office of the clerk of the United States District Court for the Southern District of New York, on the second day of August, 1912.

Now, therefore, the condition of this obligation is such that if the above named Walter B. Grant and E. E. Burlingame shall prosecute said proceedings to effect, and pay all costs which shall be awarded against them, if they shall fail to make said proceeding good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

[L. S.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Res. Vice President.

Attest:

E. M. MCCARTHY, *Res. Asst. Secretary.*

Signed and delivered in the presence of—

_____ _____

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, October 3, 1912.

LEARNED HAND,
U. S. Judge, for the Southern District of New York.

299 AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of October, one thousand nine hundred and twelve, before me personally came Wm. A. Thompson, known to me to be the resident vice president of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Walter B. Grant and E. E. Burlingame, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of New York, State of New York; that he is the resident vice president of said company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13th, 1894, that the seal affixed to the within bond of Walter B. Grant, and E. E. Burlingame is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident vice president of said company, and that he is acquainted with E. M. McCarthy and knows him to be the resident assistant secretary of said company; and that the signature of said E. M. McCarthy subscribed to said bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of three million dollars.

That is our agent to acknowledge service in the Judicial District wherein this bond is given.

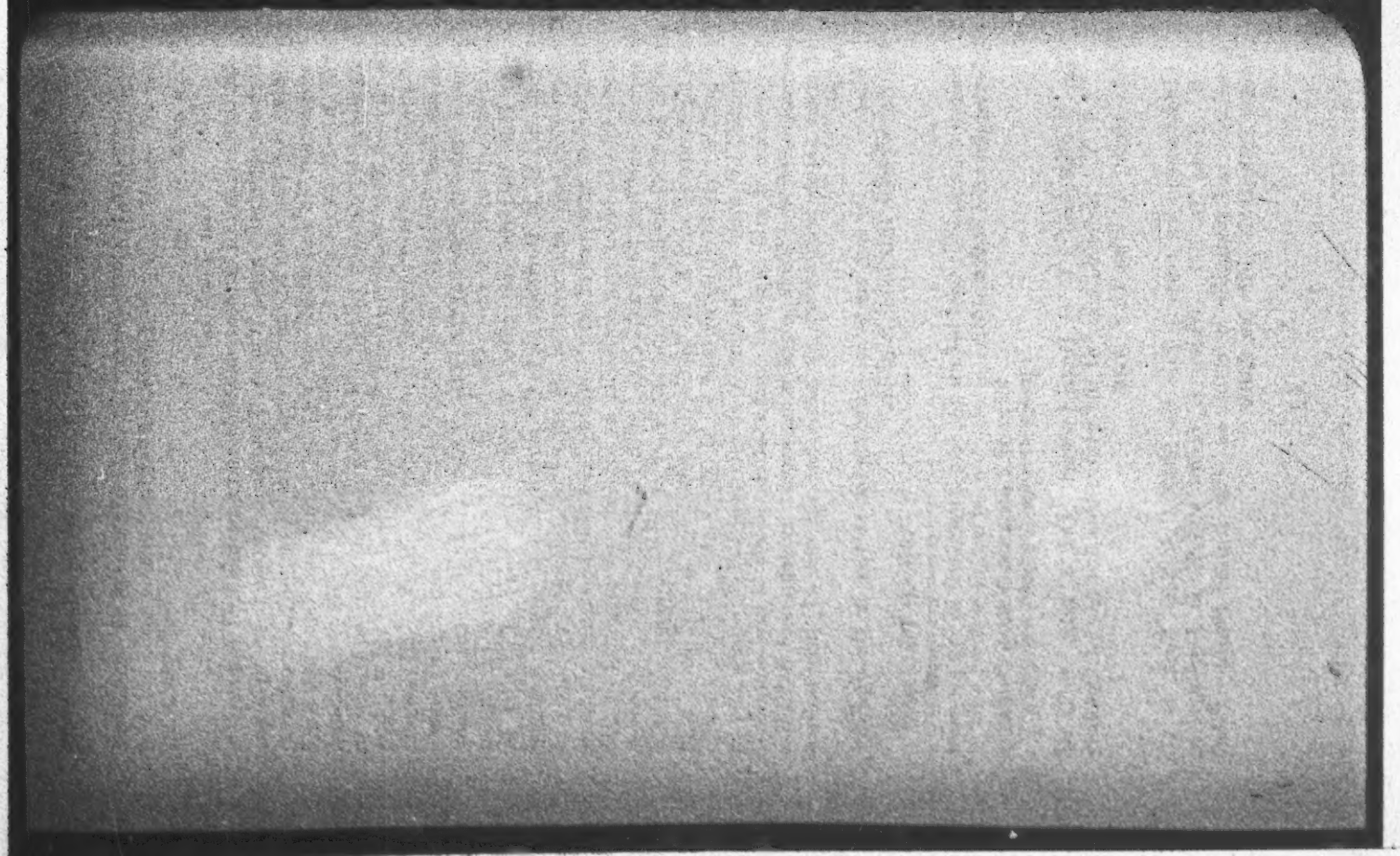
WM. A. THOMPSON.
[Deponent's signature.]

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of October, 1912.

ETTA B. COWBURN, *Notary Public.*
[Officer's signature, description, and seal.]

300 (Indorsed:) U. S. District Court. Oct. 3, 1912. S. D. of N. Y. Received copy of the within this 3rd day of October, 1912. Henry A. Wise, U. S. Atty.

(Indorsement on cover:) File No. 23406. S. New York, D. C. U. S. Term No. 831. Walter B. Grant and E. E. Burlingame, appellants and plaintiffs in error, vs. The United States. Filed October 26th, 1912. File No. 23406.



18

Supreme Court, U. S.
FILED.
NOV 15 1912
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

WALTER B. GRANT AND E. E. BURLINGAME, appellants and plaintiffs in error,
v.
THE UNITED STATES.
No. 831.

APPEAL FROM AND ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case be advanced and heard with *Wheeler* v. *United States et seq.*, Nos. 658, 659, 660, 661, which cases have been transferred to the summary docket for hearing on Monday, December 2, next, after the cases heretofore assigned for that day.

REASONS FOR THE MOTION.

Although the Government believes that on independent grounds this case should be dismissed for lack of jurisdiction, yet there was considered below,

and there is raised by the assignments of error, a question which is practically identical with that which has been put down for argument on the summary docket in the Wheeler cases.

Furthermore, there is pending in the District Court an investigation which makes an early disposition of this proceeding a matter of importance. As the entries in the corporate books, the production of which is sought to be compelled by this proceeding, are all of date not later than December, 1909, there is the possibility of embarrassment by reason of the statute of limitations if the case is not soon decided.

STATEMENT OF THE CASE.

Plaintiff in error Grant was committed for contempt by the District Court for the Southern District of New York for failure to produce before the Federal grand jury certain books and records of the Ellsworth Co., an Arizona corporation, in compliance with a subpœna *duces tecum* issued to Grant.

1. Before the subpœna issued the corporation had ceased doing business and the title to its books and papers had passed to the other plaintiff in error, Burlingame, who was an officer of the corporation.

The Ellsworth Co. is an existing corporation, while in the *Wheeler* cases the corporation had been dissolved by law, but that is an immaterial difference. The plaintiff in error here seeks to

raise the same general question as to the scope of the decision in *Wilson* v. *United States*, 221 U. S., 361, as is raised in the *Wheeler* cases, namely, whether in determining that the production of the books may or may not be compelled the test lies in the *nature* of the entries, or whether the determining factor is to be found in the question of the *title* to the books at the time the subpœna is issued.

2. This case differs from the Wheeler cases in another respect, which may defeat the jurisdiction of this court to entertain it altogether. Here the books had passed to Burlingame, who had been an officer of the corporation, and he had delivered them to Grant, his attorney. Grant urged, in response to the commitment for contempt, that the books had been delivered to him for consultation in his professional capacity as an attorney, and, further, that Burlingame had forbidden their production on the ground that they might incriminate him. The court below, however, found as a fact that they had been placed with Grant merely for safe-keeping, and ordered them produced. (See 198 Fed., 708). At the same time it did consider the constitutional question, and it held that the question of title was immaterial under the *Wilson* case; the books were corporate and should be produced. But it is seen that there is no question of compulsory self-incrimination as to *Grant*, the person to whom the subpœna was issued. Burlingame was not a party to the proceeding below. The pre-

sentment for contempt was against *Grant* alone; but in order to give the appearance of a constitutional question under the "self-incrimination" clause it is sought to make Burlingame a party here simply by joining him in the appeal and the application for the writ of error.

3. Although it may turn out that the constitutional question in the *Wheeler* cases is not really involved here, yet, because that question will undoubtedly be urged by counsel for plaintiffs in error, and because it is of importance that the case be disposed of at the earliest possible moment, it is respectfully requested that the case be advanced for hearing with the *Wheeler* cases.

I am authorized to say that opposing counsel concur in this motion.

WM. MARSHALL BULLITT,
Solicitor General.

15 NOVEMBER, 1912.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

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Supreme Court of the United States.

WALTER B. GRANT and ELMER E. BURLINGAME,
Appellants and Plaintiffs in Error,

against

THE UNITED STATES.

BRIEF IN BEHALF OF APPELLANTS AND PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error to the United States District Court for the Southern District of New York, and an appeal from an order of that Court, committing Walter B. Grant, an attorney-at-law, for contempt, in failing to examine the contents of a box and packages in his possession, to ascertain whether they contained the papers specified in a subpoena served upon him. The subpoena directed him to appear and testify before the Grand Jury of said District and he is committed further for failure to answer certain questions put to him before said Grand Jury.

Prior to June 19th, 1909, United States Post Office inspectors had commenced an investigation of the use of the mails in the alleged wireless business of the appellant, Elmer E. Burlingame (p. 144). The appellant, Walter B. Grant, resided in Boston and was at that time, and had been, Burlingame's attorney since 1903 (p. 3).

On June 19th, 1909, Grant at the request of Burlingame came from Boston to New York, to consult professionally with him, in connection with the said investigation, which

had been commenced by the Post Office inspectors (p. 144). And subsequently, and on eight different times in the same year (1909), Grant was in Burlingame's behalf in New York on the same business and was engaged in the same business in Boston on six different days in that year.

On January 4th, 1910, Mr. Grant was engaged in Burlingame's behalf, in connection with said wireless matters and again on August 1st, 1910, Grant had an interview with Burlingame in Boston.

From August, 1910, to August, 1911, Grant was absent in California, Washington and Texas for eight months altogether, being continuously absent in California and Texas from November, 1910, to April, 1911, and continuously absent in El Paso, Texas, from May to July, 1911, engaged before the International Arbitration Court, representing the United States Government and was absent during that period at other times. During this time, however, and notwithstanding these frequent absences, Mr. Grant had a number of interviews with Burlingame on his wireless business (pp. 144 and 145).

On August 30th, 1911, Burlingame was indicted by the Grand Jury in the Southern District of New York, in connection with one Cove and early in September, 1911, Burlingame left, or caused to be left with Grant in Boston, two packages and a large box. These packages and box are surmised by the United States attorney to contain the ledgers, journals, cash books and letter files of a corporation known as The Ellsworth Company, through which it is claimed Burlingame did his wireless business.

Although these books and packages are surmised to contain the journals, cash books and letter files of The Ellsworth Company, their contents are unknown, as is the whereabouts of such journals, cash book and letter files.

It is by reason of Grant's refusal to open and examine into the contents of these packages and box for the purpose

of disclosing whether or not they contain the said books and letters of The Ellsworth Company and thus assisting the Government in its effort to ascertain their whereabouts, that he is committed for contempt.

The Referee has found, and the District Court has confirmed his finding, that these packages and box were left with Mr. Grant as a warehouseman, though, no relations whatever are shown to exist between Grant and Burlingame, except that of attorney and client. While the District Court confirmed this finding of the Referee, it did so with great reluctance, stating in its opinion, that had the Court acted on the evidence alone, as it appeared in the record, it would have found otherwise, but that inasmuch as the Referee saw the witnesses, the Court concluded to adopt the Referee's finding. The language of the Court, in which it states that it would have found otherwise from the evidence alone, is as follows: *"I must confess that on a mere reading of the testimony I should not have come to the same conclusion as the Referee"* (p. 150).

On March 13th, 1912, the subpoena under which Mr. Grant is committed was served on him at El Paso, Texas, where he was engaged on professional business. This subpoena called upon him to produce the books and papers hereinbefore referred to, before the Grand Jury for the Southern District of New York, and directed him to give evidence in a criminal proceeding against one J. D. Smith, before that body.

On March 15th, 1912, two days after the service of such subpoena, but before Grant's appearance thereunder, Burlingame was again indicted by the said Grand Jury, but at this time, he was indicted in connection with The Ellsworth Company and J. D. Smith for fraudulent use of the mails in connection with wireless operations.

On March 28th, 1912, Grant, in compliance with said

subpoena, appeared before the said Grand Jury and testified that he was an attorney-at-law, engaged in Burlingame's defense. He did not produce any books or letters of The Ellsworth Company and refused to open and search in said packages or box for them, and declined to answer any further questions in regard to said packages and box, except to say that anything received by him from Burlingame was received as his attorney, for the purpose of consultation with him, professionally, and for the purpose of preparing for his defense, basing his refusal on the ground that he could not disclose any professional communication with him from said Burlingame (p. 1), such communication being privileged, because of the relation of attorney and client (p. 1).

The Grand Jury thereupon presented Grant to the Court for contempt, whereupon, *Burlingame was permitted* by the Court to appear by counsel and to set up that the books and *letters called for by the subpoena were his individual property and that to disclose their whereabouts or contents, would tend to incriminate him* (p. 2).

Grant did not know and does not know what the contents of the packages and box are and the Government did not know and does not know the whereabouts of the books and letters of The Ellsworth Company (bottom p. 153) called for by the subpoena.

The Court thereupon ordered a Reference to take evidence on the claim of Burlingame of title to said books and letters and on the claim to rights and privileges set up by Grant (pp. 1 and 2). The suggestion which has been made that Burlingame is not a party to this proceeding is therefore clearly unfounded, he having been thus, by the Court, permitted to intervene.

It was and is undisputed that Grant was at that time Burlingame's attorney and that he had been such since 1903.

The Referee took testimony and found that Grant is Burlingame's attorney (p. 139, finding Fifth), and his report having come on before the Court for confirmation, *the Court found that the books and papers called for by the subpoena were the personal property of Burlingame.* (See page 147, where the Court refused to confirm the Seventh finding of the Referee.) The finding (p. 139) of the Referee was that the title to said books and papers is in The Ellsworth Company and not in Burlingame. (See also opinion of the Court, p. 149).

The Referee, however, found, and the Court in the manner we have heretofore explained, confirmed the finding, that the box and packages were left by Burlingame with Grant, not for consultation, but as a warehouseman. Thereupon, the Court imposed a fine on Mr. Grant and adjudged him to be in contempt.

Specification of errors urged.

1. It was error to hold that Grant, one of the plaintiffs in error, had been guilty of contempt of the court in failing to examine the contents of the box and packages referred to in his testimony before the referee herein, to ascrtain whether they contained the papers specified in the subpoena, and in failing to answer questions before the grand jury put to him concerning them.

2. It was error to hold that Grant was not entitled to claim privilege from answering the questions propounded to him by the grand jury and that he is not entitled to claim privilege from ascertaining or disclosing the contents of the box and packages in his possession mentioned in said order.

3. It was error for the court to hold that Grant was in contempt.

4. It was error for the court to confirm the finding of the referee, that the character of the books and papers

rather than the question of legal title thereto is the test as to whether or not the same are privileged.

5. It was error for the court to confirm the finding of the referee, that when a private individual acquires title to a corporate book it is held subject to the right of the State and to the right of the United States in causes within its jurisdiction to any records of the corporation contained therein and to the book itself, to the extent necessary to obtain such records.

6. It was error for the court to confirm the finding of the referee, that the corporate books and papers called for by the subpoena are not privileged in the hands of Elmer E. Burlingame, the respondent's client, even if Burlingame had acquired title thereto from the corporation.

7. It was error for the court to confirm the finding of the referee, that the box and packages mentioned in his report were delivered to the respondent and were received by him for safe-keeping only and not for consultation.

8. It was error for the court to require the respondent Grant, who is the attorney of Elmer E. Burlingame, to search in the box and packages mentioned in the order for the purpose of ascertaining and disclosing the contents and of disclosing the whereabouts of the books and papers called for by the subpoena, which books and papers would tend to incriminate the said Burlingame, who is the respondent's client.

9. It was error for the court to hold that the respondent did not receive the books and papers called for by the subpoena within his professional privilege.

ARGUMENT.

POINT I.

The Jurisdiction of the Court.

It has been suggested that this Court has no jurisdiction because the Court below has found that Grant received the packages and box as a warehouseman only and not as an attorney for consultation.

Had the Court below found that the packages and box were left with Grant as an attorney for consultation, then undoubtedly, a Constitutional question would be presented. This Constitutional question would be whether or not it was a reasonable search and seizure to require an attorney, under a subpoena *duces tecum*, to open and examine certain packages and a box belonging to his client and left with him for consultation for the purpose of discovering and disclosing to the Government the whereabouts of certain books and letters which the Government is seeking to find, and which if found, would tend to incriminate the client, and for the purpose of delivering over such books and letters to the Government, if so found.

We submit (1) that the evidence contained in the record is not susceptible of the construction that the box and packages were left with Mr. Grant as a warehouseman, and (2) that there is no evidence to sustain the finding that he was a warehouseman, and that (3) if there is any evidence to sustain such a finding the preponderance of the evidence is so strongly opposed to the finding that it cannot stand.

The question is whether or not this Court will consider or review the finding of fact which the Court below has made on the question of the character of the possession of this box and packages.

By Section 238 of the Judicial Code, it is provided that "*Appeals* and writs of error may be taken from the Dis-

trict Court * * * direct to the Supreme Court * * * in any case that involves the construction or *application* of the Constitution of the United States," appeals, of course, bringing up questions of fact as well as of law and writs of error bringing up questions of law alone. (*Dower v. Richards,* 151 U. S. 663.)

By Section 128 it is provided

> "that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts * * * in all cases other than those in which appeals and writs of error may be taken to the Supreme Court as provided in Section 238, unless otherwise provided by law."

Thus cases specified in Section 238 are excepted from those which are appealable to the Circuit Court of Appeals and the only appeal permitted in cases specified in that Section is to this Court; hence, where the construction or application of the Constitution is claimed to be involved, there can be no review (for the purpose of raising the constitutional question) of the facts found in the District Court unless they can be reviewed on appeal to this Court.

We concede that if this Court is without power to examine the evidence on which it is claimed that Grant held these packages and box as a warehouseman and not as a lawyer, this Court is without jurisdiction. But, we submit, that the individual claiming the protection of the Constitution cannot be deprived of his Constitutional right by a finding of fact, which, if sustained, shows that no Constitutional question is presented, when the finding of fact is contrary to what is shown by the evidence.

In other words, if the contention that this Court has no jurisdiction in the case at bar is sound, it follows that this Court has no power to pass upon the Constitutional right

of an individual, save in cases where the facts are conceded or found in favor of that individual.

Take the situation of Grant and Burlingame in the case at bar. When the District Court decided against them, they were faced with the possibility of appealing either to this Court or to the Circuit Court of Appeals. If they appealed to the Circuit Court of Appeals they could not claim that any Constitutional question was involved, for if so, their appeal should have been direct to this Court. All they could have asked to have reviewed by the Circuit Court of Appeals would have been questions of law and fact as to an attorney's privilege.

As Grant and Burlingame are relying upon a Constitutional privilege, such an appeal would have been fruitless for their purposes. If, then, this court has no jurisdiction, Grant and Burlingame can never have the question of their Constitutional rights reviewed. The result would be that the question whether or not Grant and Burlingame had a Constitutional right will have been disposed of by the Court of original jurisdiction without any right of appeal.

The jurisdiction of this Court to review evidence where a Constitutional privilege is claimed is, however, established by the case of *Ballman* v. *Fagin*, 200 U. S. 186.

In that case, Ballman was committed for contempt for refusing to produce under a subpoena *duces tecum* a certain cash book in use in his business. In so refusing Ballman stated that the cash book would tend to incriminate him. Ballman appeared before the Court and made the following answer: "I have not now and neither at the time nor at any time since the service of the first subpoena upon me in this matter, have I had in my possession or under my custody or control, the book referred to in the order of the Court entered on April 8, 1905, or any book showing transactions under the names of A. Smith or A. Johnson, and am unable to produce the same."

On the day the order was made the foreman of the Grand

Jury questioned Ballman with reference to the cash book and he said that there was no such book.

The Court below construed Ballman's answers to be a denial that he had a cash book, and witnesses were called to prove that he did have a cash book and the Court, believing that he did have a cash book, committed him for not producing it.

The case having been appealed to this Court, this Court reviewed the evidence given before the Court below and came to the conclusion that the interpretation placed upon the answers of Ballman was incorrect and that the correct interpretation of Ballman's answers was that he had not denied having a cash book but had denied having a cash book such as was called for by the subpoena, namely, a cash book "showing transactions under the names of A. Smith or A. Johnson". This Court held that the court below "was not warranted in finding Ballman guilty by any evidence which it had before it."

There were three questions considered in Ballman's case: First, that the evidence was not susceptible of the construction that Ballman had a cash book such as was called for by the subpoena, and hence, the Court below was in error in committing him for contempt by reason of his failure to produce it. Second, that even if Ballman had such a book he was excused from answering under his Constitutional privilege whether he had one or not. Third, that if the book disclosed dealings with suspected persons, Ballman might have been liable as an abettor or a bucket shop keeper, and hence, could not be required by reason of his constitutional right to produce the book.

As we have already said, we are confident that the evidence produced in the Court below and referred to at length in the following point is not susceptible of the construction that the packages and box were left with Mr. Grant as a warehouseman.

POINT II.

The finding of the Court that Grant received the packages and box as a warehouseman is unsupported by the evidence.

The finding of the Court and the Referee that the packages and box were left with Mr. Grant as a warehouseman is based upon the construction placed by the Referee, and reluctantly acquiesced in by the Court, upon certain words found in the testimony of Mr. Grant and Mr. Burlingame, coupled with the fact that the packages and box had not, at the time the subpoena was served, been actually opened.

We submit that the testimony relied on by the Court and Referee is not susceptible of the construction which has been placed upon it, and also that the remaining testimony establishes quite the reverse of the finding of the Referee.

We will first ask the attention of the Court to the testimony which we submit establishes that the packages and box were delivered to Mr. Grant for consultation, and not as a warehouseman.

The Government brought from Boston, under subpoena, a witness, one McLean, who testified before the Referee. This witness was plainly timid, and if the Court will examine his testimony, it will be seen that whenever he testified to anything unfavorable to the Government, he was immediately asked by the United States Attorney or by the Referee, if he was sure that he so remembered, whereupon he would weaken. This witness was a Government witness, and we submit that what he first testified to is the more reliable of his statements.

At pages 71 and 72, McLean testified as follows:

> "The Referee: What was it that indicated the purpose he wanted them received by Mr. Grant; what was the reason for that?

The Witness: He stated they were private papers and he said he wanted to know that they were taken, or given to Mr. Grant, and he wanted to know whether I would see Mr. Grant, and see that he would receive them for him.

The Referee: For what purpose?

The Witness: *As his attorney.*

Q. Did he say that?

A. I do not know that he said as his attorney, but he said Mr. Grant—he spoke about him as being his attorney any way.

Q. Well, he said he wanted Mr. Grant to get them. What else did he say?

A. Now, that was about the substance of it, Mr. Stephenson. * * *

The Referee: That is what I want to find out, what he told you about it.

Q. He didn't say anything about what his purpose at that time was?

A. As I recall he wanted to have Mr. Grant have them *as his attorney.*

Q. Did he say that?

A. That is my best recollection, that he wanted Mr. Grant to have them.

Q. Can you recall whether he used the word 'attorney' or not?

A. I should say to the best of my knowledge, yes, to the best of my recollection.

The Referee: He didn't say anything that led you—that would indicate to you that they were there simply as a place to keep them in or in order that you might have a talk with Mr. Grant about them later, so as to have the books present at the interview or to simply have them there for safe keeping? Of course, it isn't necessary that he should have said any such thing to you, but if he did tell you anything of that kind, that would enable you to answer that question, tell us what it was?

The Witness: To the best of my recollection all that he said was that he wanted Mr. Grant to have those papers *to go over them.*

Q. Do you remember that?

A. Well, yes, it was to the effect that they were private papers and personal papers, and he wanted Mr. Grant to have them, that is the best of my recollection.

The Referee: Are you positive that he said anything that would indicate that he wanted Mr. Grant to go over them, rather than to keep them?

The Witness: Well, I took it this way, that they were his papers, personal papers, and that Mr. Grant was to have them *as his attorney.*"

We next ask the attention of the Court to the testimony of Mr. Grant.

Mr. Grant is a member of this bar, a man of high standing in his community and is now, or was lately, engaged as Counsel for the Government in the Arbitration with Mexico on the question of the boundary between the United States and that country. He is entirely disinterested and no reason can be suggested why he should not be fully believed.

Mr. Grant's testimony is as follows:—

"To the best of my memory after he had brought two packages to me *he stated to me that he desired to consult me about them* and *I said that at that time I could not take it up* and after we had taken those packages to my other office where I told him we could work on the matter more undisturbed, and as I recall, I said to him, 'Well, Mr. Burlingame, when you wish to go into this matter, notify me and give me a day or two notice so that I can arrange to take up this matter with you.' *I do not remember that there was anything said in regard to opening them at that time, or not.*

Q. Now, was there anything said as to why you could not take up the matter in connection with those papers at that time?

A. I told him I was too busy for that day. * * *
Q. Were you going into Court?
A. I was going into Court at that time. As I recall it, he came into my office about one o'clock and I had to go into Court at two o'clock, when our afternoon Court opens."
(Pages 89 and 90.)

Mr. Grant says, at page 91:—

"The Witness: As I have stated here, that he said he wished to consult me and secure my advice about them, and I told him I hadn't time to do it then, and he then said that he would like to leave them with me and at my suggestion we took them to my other office where I had private work and—where I wouldn't be disturbed, and it was that time that occurred what I have said in regard to your first question as to whether there were any instructions. There were no instructions not to open them at that time, as I recall." [Referring to the time when the packages and box were received.]

At page 91, referring to a meeting at the Bar Association, after the service of the subpoena, Mr. Grant testified as follows:

"Mr. Burlingame at that time instructed me not to open the box or two packages for the purpose of producing them in Court or for the purpose of disclosing what their contents were.
Q. Now, other than those instructions with reference to the opening of the box or packages, can you recall any other?
A. I do not."

Mr. Grant says, at page 104 (top):

"Q. Mr. Grant, did Mr. Burlingame at any time order or direct you not to open these packages and

this box, except in so far as he directed you not to open them for the purpose of disclosing their contents to the Government?

A. No, sir, not except as I have testified at the Bar Association. * * *

The Witness: No, I was directed not to open them for the purpose of disclosing the contents or of producing them."

Mr. Burlingame's testimony is as follows (pp. 99 and 100):

"Mr. Grant told me he was too busy to go into an extended conference or consultation, and said that whenever I could get around to it to come back, to let him know and then the papers would be there, the packages would be there and that we could then go over them.

The Referee: But you never got around to it, did you?

The Witness: I haven't said that.

The Referee: No, but I ask you.

The Witness: Well, *I got around, ready myself to go through, or have a consultation and there wasn't time then, although there was some consultation, after some of the boxes or some of the packages had been opened.*

Q. What time are you talking about now?

A. I am not talking about this first one, but I am replying to the Referee.

Q. Now then, is that all that was said on this first occasion on that subject?

A. Well, I cannot remember the exact language. * * * *

The Witness: At that time there was reference made to a box which was to be sent to Mr. Grant's office which contained memoranda that I wanted to consult him about, and that was included in this other remark that I made about when I could come back, and about

giving him some notice so that we then would go over everything.

The Referee: Taking up the whole business, including what was there and what was to come?

The Witness: Yes, that was the purport of it; I cannot tell the exact words. * * * * * * *

A. I should say about the 1st of April, 1912, when I saw Mr. Grant at the rooms of the Bar Association, that I had a talk with Mr. Grant, and Mr. Grant said to me: 'Do you want me to open these bundles and box *for the purpose of giving information to the Government or making any disclosures?*' and I said, 'I do not.'

(Page 101.)

Q. Now, you testified a moment ago in answer to a question of the Referee about some other conversation on another occasion. Give us the substance of what was said on that occasion.

A. I should say that was about a month after the time the packages and box were left with Mr. Grant. * * *

Q. Now, have you given to Mr. Grant at any time instructions not to open—specifically not to open these bundles or these boxes for any purpose except for the purpose of disclosing the contents or the whereabouts of the contents to the Government?

A. No.

Q. That is the extent to which you have forbidden Mr. Grant to open those boxes or packages?

A. Yes."

(Pages 99, 100 and 101 of the printed record.)

This testimony of Mr. Grant and Mr. Burlingame, we submit, is conclusive to the effect that the packages and box were deposited with Mr. Grant for consultation. The only reason that a consultation was not had, at the time of the deposit, was one over which Mr. Burlingame had no control, namely, the engagement of Mr. Grant to go into

Court on that day at two o'clock. The interview between Mr. Grant and Mr. Burlingame occurred about one o'clock in the afternoon. At that time Mr. Burlingame and Mr. Grant both agree that a consultation was asked for by Mr. Burlingame and the only reason for the request not being granted was the engagement of Mr. Grant to be in Court at two o'clock, and sufficient time did not remain for a consultation, which, in length, would be in any way satisfactory. Surely it cannot be said that books are left with an attorney as a warehouseman simply because an immediate consultation being impracticable the attorney continues to hold the books pending a future consultation.

We submit that after Mr. Burlingame had been told on that day by Mr. Grant that he had no time to consult with him, that even if it be assumed that Mr. Burlingame then directed Mr. Grant not to open the packages or the box until he came again, it would have no bearing on the issue as to whether or not the packages and box were delivered for consultation. The uncontradicted evidence is that the consultation was sought and that it was not had by reason of circumstances over which Mr. Burlingame had no control, and that the question of leaving the papers in the order in which they were, for the convenience of a future consultation, did not come up until afterwards.

The request of Mr. Burlingame that the packages and box be not opened, if such a request was ever made, we submit does not in any way alter the purpose of the original possession or the continuance of that purpose.

We will now ask the attention of the Court to the language of Mr. Grant and Mr. Burlingame which has been construed by the Court below and by the Referee as showing a direction to Grant by Burlingame not to open the packages or box. This testimony of Mr. Grant is found at pages 11 and 12.

At page 12, Mr. Grant volunteered the following statement:—

"The Witness: I might say here also, that I did not have the right under the circumstances under which this box or parcels were delivered to me, that I haven't undertaken to open them, and would not without the consent of my client, and he has directed me that I have no power to do so—my client, Elmer E. Burlingame."

The testimony immediately preceding this statement reads as follows (p. 11):—

"Q. Mr. Grant, I understand you to say that you searched everything in both of your offices, except in the bundles and box to which you specifically referred?

The Referee: Two bundles and one box; is that right?

The Witness: Yes; two packages and one box, and the box I would say is nailed securely.

Q. Except in the two packages and one box that you have referred to, you have searched for the books and documents and papers called for by that subpoena?

A. Yes.

Q. And you found none (p. 12)?

A. No."

This statement is treated by the learned Court (p. 150) and the Referee as indicating that Grant had no right to open the box and packages under the original circumstances of their deposit with him, and hence, it is concluded that they were not deposited for consultation, but only as a warehouseman, or for safe keeping.

The witness was being examined to ascertain what search he had made for the books and letters called for by the subpoena, and he had just answered that he had searched everywhere except in the bundles and box specifically referred to, and that the box was securely nailed.

He then volunteered the statement that under the circumstances under which they were delivered he had no

right to open them and would not do so without the consent of his client.

Mr. Grant, it seems to us, plainly meant that he had no right to open them, and would not open them by virtue of the direction contained in the subpoena, namely to disclose their contents to the Government, and that the circumstances of their delivery to him being those of a delivery by a client to an attorney, that he had no right to open them for the purpose under discussion, namely, for the purpose of complying with the subpoena.

Had the statement of Grant above quoted been made independently, it might have been subject to the construction placed upon it by the learned Court and the Referee, but being made in connection with an explanation of why Mr. Grant had not complied with the directions of the subpoena requiring the opening of the box and packages, and being taken in connection with his most positive testimony that no directions were given him when he received the packages and box that he should not open them, it cannot be so construed.

We think that the testimony must be taken in consideration with all the testimony of Grant, and that when taken in connection with its immediate context, and all of Grant's testimony, it is not subject to the interpretation placed upon it by the learned Court below.

The real instructions in the proper sense of the word "instructions", which were given by Burlingame to Grant, may be found in the telegram (Exhibit "E", page 109) sent by Burlingame to Grant immediately after he learned that Grant had been served with a subpoena. This telegram shows most clearly that Burlingame regarded Grant as his attorney and not as a warehouseman and that his prohibitions were confined to disclosures, confirmed subsequently at the Bar Association (pages 100, 104).

We most respectfully ask the attention of the Court to

that part of Burlingame's testimony which has been construed as a direction by him to Grant at the time the packages and box were left with Grant, not to open them.

This testimony is found at pages 38, 39, 40, 41, 99, 100 and 101, but we particularly desire to call the attention of the Court to the following testimony at page 39:—

> "A. Well, I would say that at a time when I personally delivered to Mr. Grant some packages of paper I told him that they were for the purpose of being used in my defense, and that when we got ready and the time came that we were ready to consider the questions and go over them; that we would open them, and I wished that they would not be opened until then; or it was language to that effect; I don't know and I can't say that I used that language.
>
> Q. When did you tell him not to open it?
>
> A. I should consider that that conversation would be in the line of a request not to open, or an order.
>
> Q. What was the order which you gave him about opening them or not opening them?
>
> A. I have stated it, in effect.
>
> Q. Well, state it again.
>
> A. Well, that there was no need of our going over the contents at that time, but we would do so some later time when he had time to devote to a thorough examination and going into the question *that was brought up by some remark that he had made about there not being time then to go through the matter.*"

Mr. Burlingame subsequently stated that the only actual instructions given to Mr. Grant not to open the packages and box were given after the subpoena was served, and that these instructions were limited for one purpose, namely, for the purpose of disclosing their contents to the Government (p. 99), but the quotation above from page 39 is construed, even in the face of that testimony, to show instructions at the time the box and packages were left with Mr. Grant not to open them.

We submit that this testimony is not susceptible to that construction. It is perfectly plain that Burlingame stated in the original instance that he really thought he said to Grant, namely, that he wished Grant would not open them until they were ready to consider the questions involved.

Mr. Burlingame was plainly under the impression that it was to his advantage to construe these words into a definite order to Grant forbidding him from opening the packages and box, and his subsequent testimony is a mere statement of opinion of what these words meant and is not testimony at all.

Furthermore, the language of Burlingame even here is that he told Grant that these papers were delivered to him for the purpose of aiding him in his defense and also that a consultation was to be subsequently had, and this was certainly not inconsistent with a delivery for consultation, but distinctly shows that a consultation was contemplated.

We submit that the testimony of Mr. Grant and Mr. Burlingame thus relied upon by the Court and learned Referee is not susceptible to the construction which was placed upon it, and if we are right in our view of this testimony, there is nothing left in the case to indicate that the deliverey was made to Mr. Grant as a warehouseman, except the mere fact that the packages and box had never been actually opened by Grant at the time the subpoena was served.

Standing alone, we submit, that this fact is not sufficient to sustain this finding. Grant had been Burlingame's attorney for eight years, the investigation of the Post Office inspectors was known to be already in progress and Grant had been repeatedly called to New York for consultation on the very business to which the books and letters is supposed to relate and in connection with which the indictment of Burlingame was subsequently found, and Grant had frequently consulted with and acted for Burlingame on the same subject in his own office in Boston. It seems to us

that under the circumstances here existing it would require the strongest kind of evidence to sustain a finding that the delivery to Grant was made as a warehouseman.

Furthermore, the fact that the packages and box were not opened by Grant is fully explained by two circumstances: First, the frequent absences of Grant on professional business in other parts of the country, and second, the inactivity of the Government in its proceedings against Burlingame, nothing appearing to have been done between the indictment in connection with Cove on 30th day of August, 1911, and the indictment in connection with The Ellsworth Company on the 15th day of March, 1912.

The habit of lawyers to leave the preparation of a defense until it is actually necessary to make it is well known to the Court, or to express the same idea in the language of Mr. Grant, in his testimony at page 104, "lawyers do not borrow any trouble until they have to."

A reference was made by the Referee to the fact that Burlingame had New York Counsel at the time he left this box and packages with Mr. Grant, with whom he had consulted more frequently than with Mr. Grant, but this circumstance, we submit, is answered by the fact that his New York Counsel was at that time absent in Maine not to return until some time in October (p. 99).

POINT III.

The title to the books and letters called for by the subpoena, being in Burlingame personally, the case of Wilson v. United States (221 U. S. 361) has no application to the case at bar.'

The question involved in the *Wilson* case is very clearly stated by the Solicitor General, as follows (page 366):

> "The subpoena called for a book which belonged to the United Wireless Telegraph Company which had

come into his physical custody simply as an officer of that Company, and had been recalled from such custody by formal action of the Board of Directors. He was not protecting himself in the possession of his books, nor refusing to be a witness against himself, but was obstructing the company and its representatives other than himself in the performance of an order of the Court for the production of the books of the Company which they were willing to perform."

At page 367, the Court says:

"The contempt consisted in the refusal of the plaintiff in erorr and appellant, Christopher C. Wilson, to permit the inspection by a grand jury of letter press copy books in his possession. *The books belonged to a corporation of which he was President* and were required to be produced by a subpoena *duces tecum.*"

The subpoena ran against the United Wireless Telegraph Company, the corporation owning the books, and was served on Wilson as its President. No claim of title was made by Wilson, but he stated that the books were essential in his defense, and claimed they would tend to incriminate him. He produced the books before the Grand Jury but refused to surrender them. He was committed "until he shall cease to obstruct and impede the *United Wireless Telegraph Company* from complying with the subpoena (p. 369)."

On behalf of the Directors before the Court, minutes of a meeting, showing a demand on Wilson that he produce the books, was presented (p. 371).

Wilson's conduct was antagonistic to the corporation so far as his attitude is shown. The majority of the Directors appeared before the Court and urged their solicitude to comply with the writ.

They presented their formal action taken at a meeting

of the Board, at which they demanded of Wilson the delivery of the books for production before the Grand Jury (p. 376).

At page 377, the Court says:—

> "Undoubtedly it [the Constitution] also protected him against the compulsory production of his private books and papers [citing cases]. But did it extend to the corporate books?"

At page 378, the Court says:—

> "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person."

At page 379, the Court says, in considering the argument of Wilson's counsel:

> "If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable, and, maintaining the *absolute control which alone will insure protection from their being used* against him in a criminal proceeding, he may *defy the authority of the corporation* whose officer or fiduciary he is and assert against the visitorial power of the state, and the authority of the Government in enforcing its laws, an impassable barrier."

Surely, this language argues most strongly that had Wilson had the title to the books in question the Constitution would have insured him protection from having them used agaist him.

We submit that the Court had in mind that if the books and papers had been Wilson's absolute property they would have come within the protection of the Constitutional provision.

The Court takes up a discussion of a number of cases where books required to be kept by law are subject to visitorial inspection and at the bottom of page 381 and the top of page 382, the Court says:

> "The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the *custodian* has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection."

There is no law of Arizona requiring the keeping of such books or papers as is called for by the subpoena and there is no law of the State of New York requiring the keeping of such books or papers by a foreign corporation. The only books required by the Laws of the State of New York to be kept by a foreign corporation is a stock book. See Stock Corporation Law, Section 33 of the Laws of the State of New York, 1909, Chapter 61.

The portion of that section material to the case at bar reads as follows:

> "Every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock book, containing the names, alphabetically arranged, of all persons who are st[illegible]rs of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon."

At page 385, the Court says:

> "The only question was whether *as against the corporation* the books were lawfully required in the administration of justice."

At page 383, the Court says:

> "Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law."

At page 386, the Court, at the close of the opinion, says:

> "Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his *official capacity*, in accordance with the requirements of the subpoena."

In the case at bar, the corporation has entirely lost control of the books and papers in question. They are not in the custody of Mr. Grant or Mr. Burlingame in the sense in which the books were in the custody of Wilson. Mr. Burlingame is the absolute owner of these books and papers and they are his private property and under the fourth amendment of the Constitution we submit that he should not be made to produce them for the purpose of incriminating himself, and this applies with equal force to his attorney, as it does to him.

At page 387, Mr. Justice McKenna says:—

> "Upon what ground was the privilege denied? *Upon the ground that the books were not his property, but that of the corporation.* * * *

POINT IV.

The packages and box having been left with Mr. Grant as attorney for Burlingame, and the books and letters called for by the subpoena being the personal property of Burlingame, the order appealed from was erroneous.

The fourth amendment to the Constitution of the United States provides:—

> "The right of the people to be secure in their persons, houses, *papers*, and *effects*, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized."

Plainly this, even in its narrowest sense, covers the papers and effects which are theirs, namely, of which the people have ownership.

A.

In the case at bar, the packages and box are held by Mr. Grant as Mr. Burlingame's attorney. What they contain is unknown to Grant and unknown to the Government. For a long time the Government has sought diligently and unsuccessfully to ascertain the whereabouts of the books and papers called for by the subpoena. The step which they are now seeking to take is to ascertain whether or not these books and letters are in the packages and box in Grant's possession. With a view to doing this they propose to have a search by Grant of Mr. Burlingaame's property by the use of a subpoena *duces tecum*, and should such search result in the Government learning that the books and letters called for by the subpoena are in the box and packages,

than it is proposed by the Government to make a seizure of such books and letters through the use of the same subpoena by an order adjudging Mr. Grant to be guilty of contempt.

We submit that to thus use the attorney of an individual to make a search and seizure is unreasonable and is not permissible under the Fourth amendment to the Constitution.

B.

Should the Government succeed in requiring Grant to open the packages and box and in making him act as a Search warrant officer of the Government, then it is proposed to have Grant answer whether or not he has found the books and letters called for by the subpoena. In other words, they propose to prove through him the possession and control of such books and letters as a preliminary to calling for the same.

This, we submit, is not permissible under the fifth amendment to the Constitution within the holding of *Boltman* v. *Fagin*, 200 U. S., 186.

In that case it is said at page 195:

> "Without any inclination to enlarge on a witness' rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or *control as a preliminary to calling for the book.*"

C.

The Government having required Grant to learn the whereabouts of the books and letters and having required him to disclose that they are in his possession as attorney, then the Government proposes to require Grant to produce these books and letters before the Grand Jury. This we submit is in violation of the fourth and fifth amendments to the Constitution.

We submit that the same protection which the Constitution extends to Burlingame against the forced production of his books and letters which would tend to incriminate him, also extends to his attorney when such books and letters are in his attorneys's possession as attorney.

In *Boyd* v. *U. S.*, 116 U. S. 616, at page 630, it is said:

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

And at page 622, the Court says:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."

CONCLUSION.

We respectfully submit that the order of the Court below should be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

WALTER B. GRANT AND E. E. BURLINGAME, appellants and plaintiffs in error,

v.

THE UNITED STATES.

No. 831.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Burlingame was conducting some get-rich-quick schemes in New York City through the medium of several fly-by-night corporations, one of which was an Arizona corporation known as The Ellsworth Company. Burlingame was its sole stockholder, and about December 31, 1909, it ceased doing business, but it was never dissolved under the laws of Arizona. (R., 138, 139.)

The Federal grand jury at New York indicted Burlingame for certain acts in connection with The Ellsworth Company. (R., 1, 139.) Burlingame de-

Burlingame delivered two bundles of papers and a box to Walter B. Grant, an attorney at law at Boston, Mass. (R., 139), but Grant has never opened or examined them.

Subsequently the Federal grand jury at New York, while investigating the acts of J. D. Smith, subpœnaed Grant (an attorney in Boston), and commanded him to produce before it the following papers:

> Ledgers, journals, and cash books of The Ellsworth Company for the years 1907, 1908, and 1909; letter files of said company containing letters and telegrams received, and copies of letters and telegrams sent by said company during the years 1907, 1908, and 1909. (R., 10.)

Grant appeared, but did not produce the papers. He said he did not have them, unless perhaps they were contained in the packages and box which had been left with him by Burlingame, but he refused to examine the packages or box to find out what they contained on the ground that they were privileged communications from his client, Burlingame. (R., 1, 139.)

The grand jury presented him to the court for contempt; the court referred the matter to a referee to take evidence and report—

> as to the rights and privileges claimed by said Grant, and as to the title and ownership of said books and papers called for by said subpœna, * * * and to report such evidence with his conclusions thereon to the

undersigned, whereupon further order of the court will be made. (Order of Reference, R., 2.)

The referee took voluminous testimony (R., 3-122), filed an extensive review of the evidence and law (R., 123-138), and made a special finding of facts and conclusions (R., 138-140).

The court delivered an opinion (R., 148-151), confirmed the referee's report in all respects except on one point, and held Grant in contempt of court (R., 147). A bill of exceptions was presented by Grant alone and allowed to him alone. (R., 154, 155.) Buringame, who was in no sense a party to the contempt proceedings, attempted to force himself into the record as a party thereto by subsequently joining with Grant in an assignment of errors (R., 156), appeal and writ of error (R., 159, 160).

Decision of the lower court.

The lower court found the facts to be as follows:

1. That The Ellsworth Company kept the books and papers referred to in the subpœna, and they were corporate records.

2. That Buringame as sole stockholder had possession thereof, and after his indictment they were delivered by him to Grant—

> for *safe-keeping* in his office, and were not delivered to him in his professional capacity as attorney or for the purpose of consultation with him in such capacity. (R., 139.)

On these facts, the court found as conclusions of law—

First, that in view of the quasi public nature of corporate records as Burlingame himself could not refuse to produce them even if he had possession of or title to them (*Wilson* v. *United States*, 221 U. S. 361), therefore, no matter whether Grant held them as attorney or otherwise, he must produce them (R., 124); and

Second, that in point of fact Grant did not even hold the papers as an attorney at all, but merely for safe-keeping, and consequently no question of professional or constitutional privilege arose at all (R., 150). Grant was therefore adjudged in contempt.[1] (R., 147.)

ARGUMENT.

FIRST POINT.

The appeals here should be dismissed, because a contempt proceeding such as this is *sui generis*, is in its nature criminal, and a person adjudged in contempt must review the order by writ of error and not by appeal.

In *Bessette* v. *W. B. Conkey Co.* (194 U. S., 324, 338) it was held that under the act of March 3, 1891, the Circuit Courts of Appeals have jurisdiction to review

[1] Most of appellant's brief is based on a recital of alleged facts that do not appear in the record at all, but only in ex parte affidavits filed after the referee's report was made. Needless to say, they have no value or standing whatever in the case, and the Government will not even trouble to point wherein their falsity lies.

judgments of the lower courts for contempt, but it was said:

> Such review must, according to the settled law of this court, be by writ of error. (*Walker v. Dreville*, 12 Wall., 440; *Deland v. Platte County*, 155 U. S., 221; *Bucklin v. United States*, 159 U. S., 680.) On such a writ only matters of law are considered. The decision of the trial tribunal, court or jury, deciding the facts is conclusive as to them.

See also *Alexander* v. *United States*, 201 U. S., 117, 122; *Nelson* v. *United States*, 201 U. S., 92; *Wilson* v. *United States*, 221 U. S., 361; *Sessions* v. *Gould*, 93 Fed., 1001.

Therefore the *appeals* of both Grant and Burlingame must be dismissed.

SECOND POINT.

Burlingame has no standing in this court and his writ of error must be dismissed.

This is a presentment for contempt by the grand jury against Grant alone (R., 1); the order of reference was against him alone (R., 2); the referee's report was against him alone (R., 139); the order of the court adjudging Grant in contempt was against him alone (R., 147); the bill of exceptions was presented by Grant alone and allowed as to him only and contained his name alone as the respondent (R., 154–156).

Burlingame has attempted to force himself as a party to the contempt proceeding by merely joining with Grant in the petition for the writ of error (R., 151–

152) and in the assignment of errors (R., 156) and by having his name included in the notice of appeal (R., 159) and writ of error (R., 160). Clearly, such subsequent action does not make one a party to a record who was not a party before the rendition of the judgment or order complained of.

1. If a person was not a party to the record *before* the final order was entered, he certainly can not become a party afterwards by suing out a writ of error or taking an appeal.

2. There is nothing to show that Burlingame was a party to the contempt proceeding against Grant. The grand jury did not present Burlingame. He was not summoned in any way.

In the order of reference there is this preliminary recital:

> And the said Grant having thereupon been presented by the said grand jury to the court for contempt for such refusals, and the said Burlingame having thereupon *appeared in court* by Dallas Flannagan, Esq., his counsel, *and set up* that the books and papers called for by said subpœna are the personal and individual property of said Burlingame and not of The Ellsworth Company, and that to produce the same, to disclose their contents, or to disclose their whereabouts would tend to incriminate said Burlingame, and, further, that to disclose that the said bill of lading was received or its whereabouts would tend to incriminate said Burlingame. (R., 2.)

But that mere recital in an order in a proceeding against Grant did not *ex tempore* make Burlingame a party to the proceeding. There is no petition for intervention nor order making him a party.

In *Ex parte Cockcroft*, 104 U. S. 578, it was said:

> The petitioner was not a party to the suit, neither does it appear that he ever asked to be made a party. * * *
>
> In his showing to the Circuit Court he certainly did not make it appear that he had any real interest in the controversy. He was evidently heard as a matter of favor, and not because he had any right to intervene. Before confirming the sale the court seemed desirous of ascertaining whether, under all the circumstances, in the exercise of its judicial discretion such an order ought to be made. For this purpose it was willing to consider the affidavits produced by the petitioner. This seems to have been done out of abundant caution, not because it was necessary in law.
>
> Inasmuch, therefore, as the petitioner was not made a party to the suit, either by an express order of the court to that effect, or by being treated as such, his application for an appeal was properly denied. This case can not be distinguished in principle from *Ex parte Cutting*, 94 U. S. 14.

The statement on page 4 of Grant's brief that Burlingame was permitted to intervene is wholly erroneous.

The grand jury might (but it did not) have also presented Burlingame for contempt for abetting

Grant in keeping back the books called for by the subpœna. In such event Burlingame would have been a party; but the grand jury did no such thing. Burlingame was not represented by counsel at the hearings; nor does he appear in any way as a party to the proceeding unless the bare recital above quoted from the original order of reference can have the effect of making him a party. Obviously, upon the presentment, a lawyer arose and stated that Burlingame claimed that the papers called for were his and that their production would incriminate him, etc., and the court merely recited that fact in its order. But that is not the equivalent of constituting a person a party of record to a contempt proceeding. His status here is simply as one who has an interest in seeing Grant prevail; but the cause is one between the Government and Grant alone and must be determined as such, even though the determination may involve a consideration of rights and duties as between Grant and Burlingame. Thus no judgment whatever was entered against Burlingame. The proceeding is against Grant and the judgment is against him alone. (R., 147.)

As Burlingame was not a party below he can not be heard here. (*Bayard* v. *Lombard*, 9 How., 530, 551; *Payne* v. *Nike*, 20 How., 212, 221; *Ex parte Cockcroft*, 104 U. S., 578.)

On this ground, apart from any other, the appeal and writ of error must be dismissed as to Burlingame.

WRIT OF ERROR.

The writ of error should also be dismissed as to Grant because of this Court's lack of jurisdiction of the subject matter.

This is a non-capital criminal case. There can be no review of it here unless a constitutional question is involved. (*Bakes* v. *United States*, 212 U. S., 55; *Nelson* v. *United States*, 201 U. S., 92, 95.)

It is claimed that such a question is involved; that there was a violation of the testimonial privilege secured by the Fifth Amendment. There was, it is true, a discussion on that below; but, as the case is really presented here, that question is not involved in the sense of giving this Court jurisdiction.

The court held as a fact that Grant held the books solely for safekeeping and not as attorney. This finding will not be reviewed on writ of error. (*Bakes* v. *Campbell*, 205 U. S., 403, 407, and cases cited; and see the quotation from *Bennett* v. *W. B. Conley Co.*, *supra*.) The court said in the *Bakes* case:

> An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. *Wiscart* v. *D'Auchy*, 3 Dall., 321; *Genevra* v. *Campbell*, 11 Wall., 193; *United States* v. *Dawson*, 101 U. S., 560; *England* v. *Gebhard*, 112 U. S., 502; *Martinton* v. *Fairbanks*, 112 U. S., 670; *Doner* v. *Richards*, 161 U. S., 658 (where the cases are reviewed by Mr. Justice Gray); *Elliott* v. *Tupper*, 187 U. S., 327; Sec. 1011, Rev. Stat.

Therefore there is no question involving the application of the Constitution; there is no one before the court that is being compelled to testify against himself. Burlingame is not a party; and, moreover, there was no attempt to make him testify. There is no attempt to make Grant testify *against himself*. He is merely required to produce books, etc., which, as a matter of fact (conclusively presumed here), he holds as a mere custodian. Therefore, there is no possible theory on the facts found below whereby a constitutional question can be imported into the case.

Since then there is no question involving the application of the Constitution this Court is without jurisdiction, and the writ of error should be dismissed.

FOURTH POINT.

If the constitutional question considered below is involved, it is covered by Wilson v. United States, 221 U. S., 361.

It is urged by the plaintiffs in error that the constitutional point is properly involved since it was claimed below that the books would have been privileged in Burlingame's hands under the Fifth Amendment, and so would have been privileged if left with his attorney for consultation, and that one claiming the protection of the Constitution can not be deprived of his right by a finding of fact showing that no constitutional point is presented, when the finding is contrary to the evidence. This court is therefore asked to review the evidence on the question whether Grant held the books in his professional capacity.

(a) But on a writ of error the finding of fact is conclusive here, even though an alleged constitutional question is thereby eliminated from the case.

(b) But, assuming that this jurisdictional point is well taken, it is still not necessary to make such an examination of the evidence; for even assuming further that the books and documents were placed with Grant in his professional capacity they were nevertheless subject to production on subpoena since they would not have been privileged even in Burlingame's hands, as the lower court pointed out.

(1) Under the *Wilson* case these corporate books would not have been privileged in Burlingame's hands. The claim that the title to the books had passed to Burlingame before the subpoena issued, so much insisted upon here, is immaterial. For the sake of argument, let us concede it. Whether Burlingame has title to the books and papers or not, the entries were originally and still are corporate in character. The corporation—The Ellsworth Co.—though not actually doing business, is an existing corporation. It is subject to the visitorial power of the Government, and its history, past as well as present, may be inquired into. This can not be defeated simply by a transfer of the books containing the corporate entries. The real test lies in the nature of the entries. If these are corporate, and as quasi public, they are subject to examination irrespective of the accidental and irrelevant element of the custody, possession, or ownership of the books containing them. Such, as

[illegible] said, is the burden and logic of the opinion and decision in the Wilson case.

Judge Hand's illuminating analysis of the Wilson case and its bearing here quite disposes of the point. (Br. R., 149-151.) The question is also argued at length in the brief submitted for the United States in the *Wilson* and *Shaw* cases (Nos. 658 and 661 of this term), December 4, 1912, and reference is made to that brief.

(2) Since, then, Burlingame would have been bound to produce the books, Grant, even assuming he holds them as Burlingame's attorney, is likewise bound to produce them since they are documents independently, pre-existing, and their production, therefore, is not a disclosure of the attorney's knowledge at all. (4 Wigmore on Evidence, sec. 2305.)

Wigmore in discussing this point under his treatment of the privilege relating to communications between an attorney and his client says:

> The application of the foregoing principle to the case of documents delivered or shown to the attorney is not without difficulty. But, before examining it, a superficially related question, dependent upon other principles, must be disposed of. Is the attorney compellable to *produce in court*, by subpœna or bill of discovery, the documents placed in his possession by the client? This is not a question of compelling the disclosure of the attorney's knowledge; he may know nothing of the contents of the document, nor is he asked to testify about them. Whether the package contains

a client and or a client is immaterial. But must he plead as it?

(1) The answer depends upon the other privileges of the client irrespective of the *present privilege*. The attorney is but the agent of the client to hold the deed; if the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and the attorney is in this respect like any other agent. There is, to be sure, the added consideration of policy, namely, that if the attorney were not compellable when the client was, then the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney; and such a quibble could not be tolerated by any practical system of law. But, apart from this, the doctrine of agency is ample to justify the result. The extent of the client's obligation to produce must therefore be taken as determining the present question; and that obligation has undergone radical change in the history of our law.

* * * * *

It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law, or as a third person claiming title, or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce; and such has invariably been the ruling. On the other hand, if the *client would be compellable* to produce, either by motion or

by subpœna or by bill of discovery, then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure. (Sec. 2307.)

In connection with this it is to be observed that it appears here that Grant has never opened or examined the documents placed with him and called for by the subpœna.

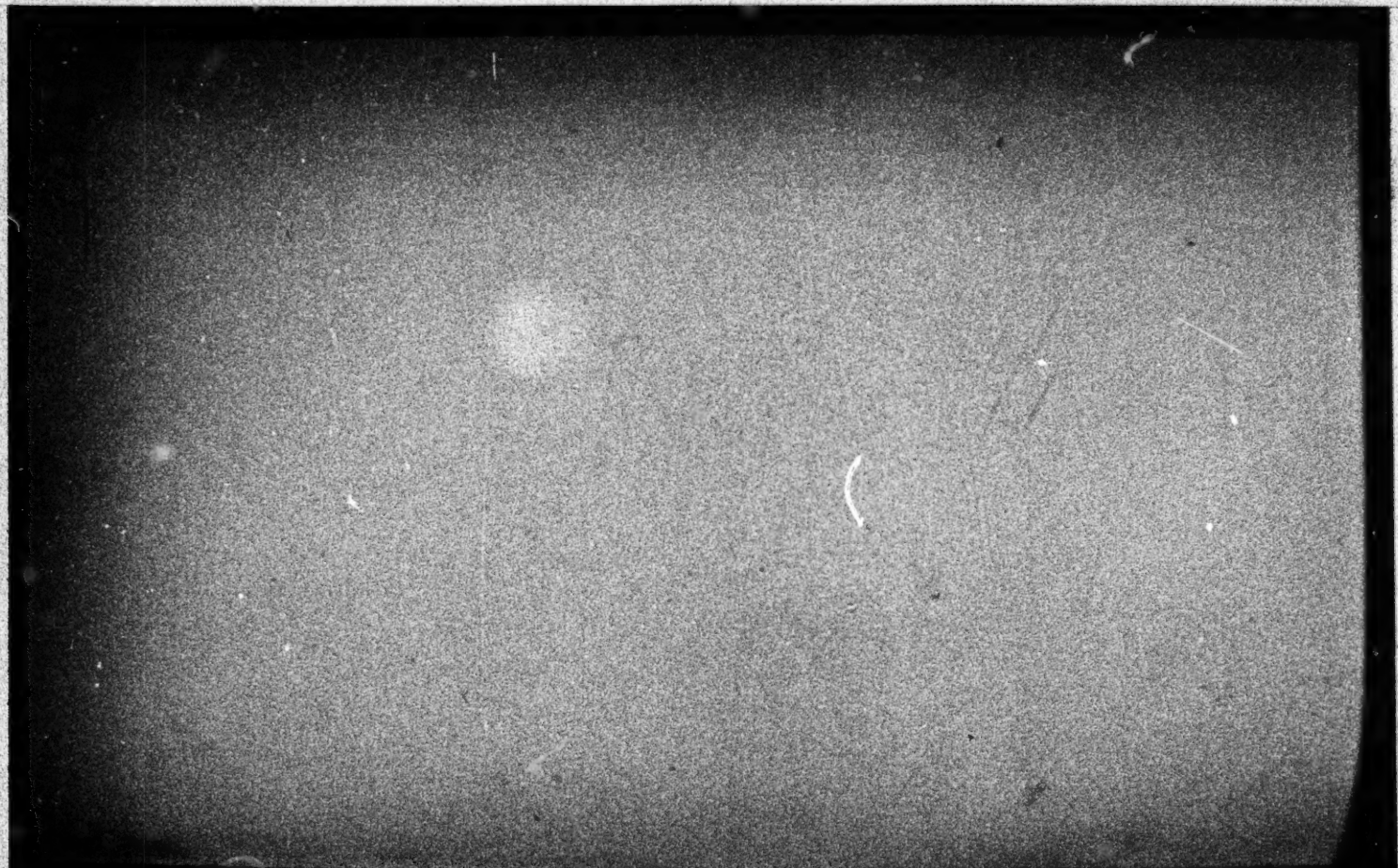
(3) The assertions of plaintiffs in error, based on the Fourth Amendment, have already been disposed of by this court. The subpœna is suitably specific, and, in any event, such an objection does not affect the validity of the order below. (*Wilson v. United States*, *supra*, at pp. 375–376; *Consolidated Rendering Co. v. Vermont*, 207 U. S., 541, 554.)

CONCLUSION.

The appeal should be dismissed as to both Grant and Burlingame, the writ of error should be dismissed as to Burlingame, and as to Grant either the writ should be dismissed or the judgment below should be affirmed.

Wm. Marshall Bullitt,
Solicitor General.
Louis C. Christie, *Attorney.*

January 2, 1913.



under subpœna of the Federal grand jury books and papers of a corporation left with him for safe keeping by a client who claimed to be owner thereof.

Independent books and documents of a defunct corporation left with an attorney for safe-keeping by a client claiming to own them are not privileged communications.

Books and documents of a corporation must be produced by an attorney with whom they were left for safe-keeping even if they might incriminate the latter.

Notwithstanding a corporation ceases to do business and transfers its books to an individual, the books retain their essential character and are subject to inspection and examination of the proper authorities and there is no unreasonable search and seizure in requiring their production before the grand jury in a Federal proceeding. *Wheeler* v. *United States*, 226 U. S. 478.

THE facts are stated in the opinion.

Mr. William A. Keener and *Mr. Dallas Flannagan* for appellant and plaintiff in error submitted:

The finding of the court that Grant received the packages and box as a warehouseman is unsupported by the evidence.

The title to the books and letters called for by the subpœna, being in Burlingame personally, the case of *Wilson* v. *United States*, 221 U. S. 361, has no application to the case at bar.

There is no law of Arizona requiring the keeping of such books or papers as is called for by the subpœna and there is no law of the State of New York requiring the keeping of such books or papers by a foreign corporation. The only books required by the laws of the State of New York to be kept by a foreign corporation is a stock book. See Stock Corporation Law, § 33 of the Laws of the State of New York, 1909, Chapter 61.

The packages and box having been left with Mr. Grant as attorney for Burlingame, and the books and letters called for by the subpœna being the personal property of Burlingame, the order appealed from was erroneous.